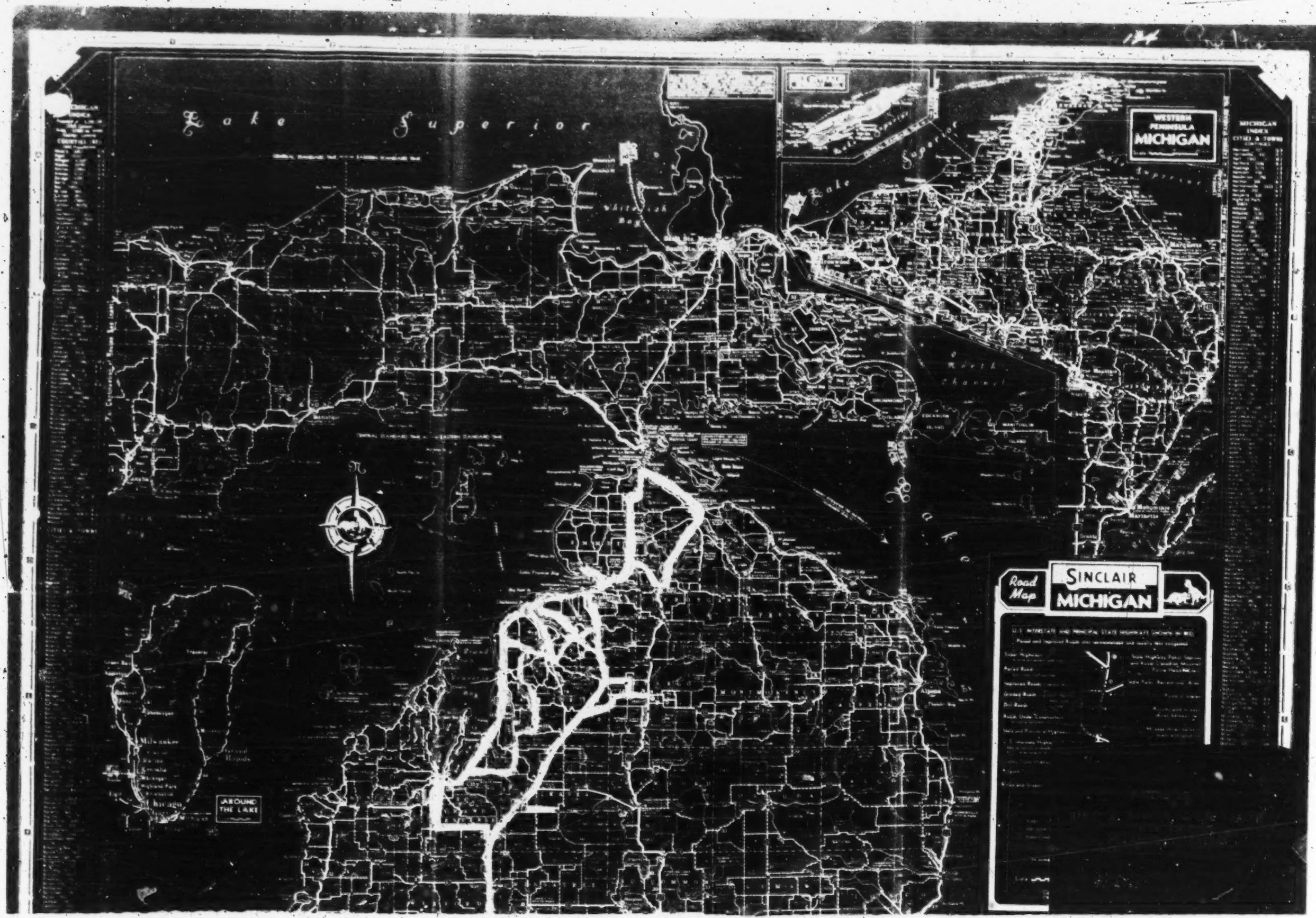
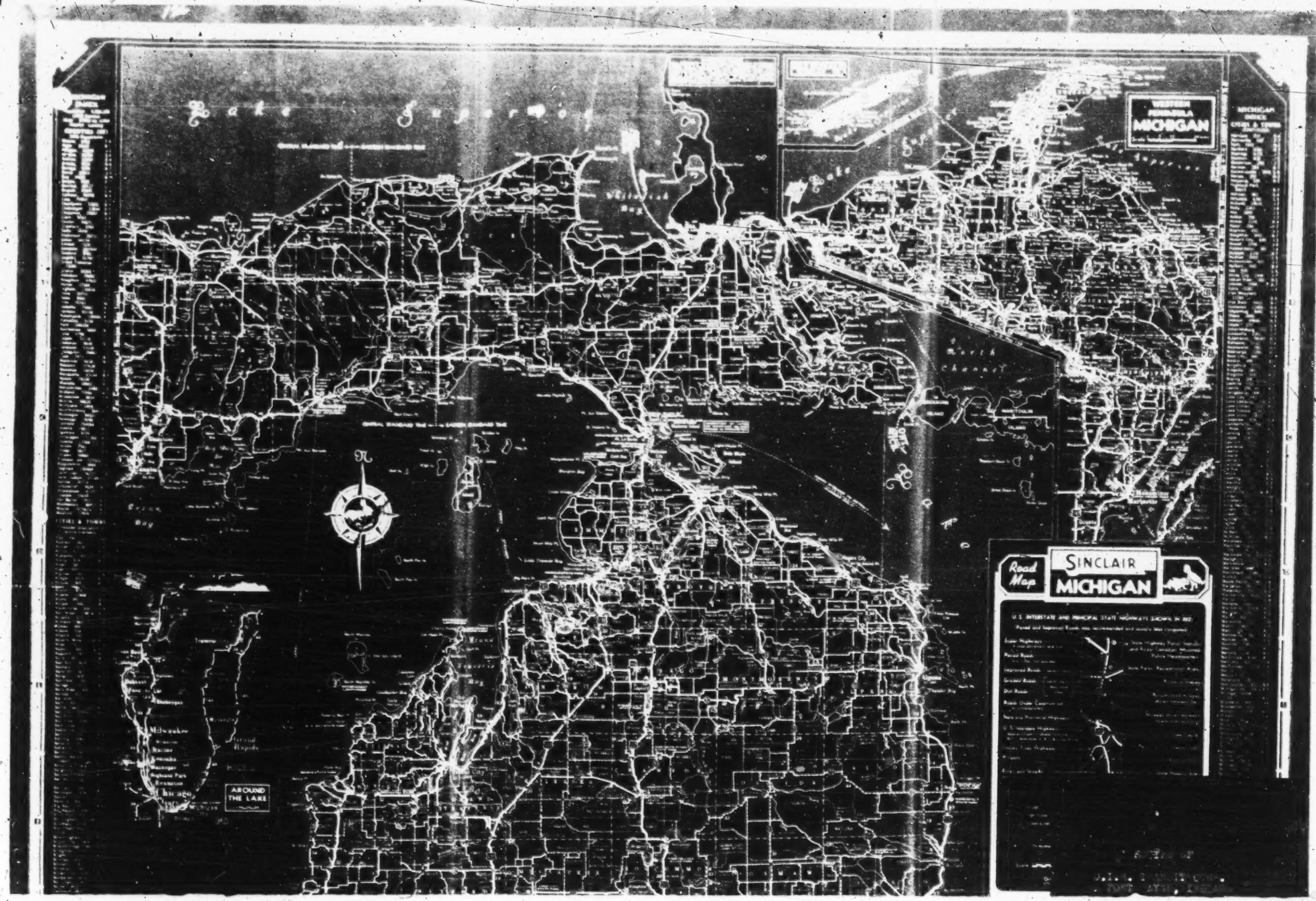
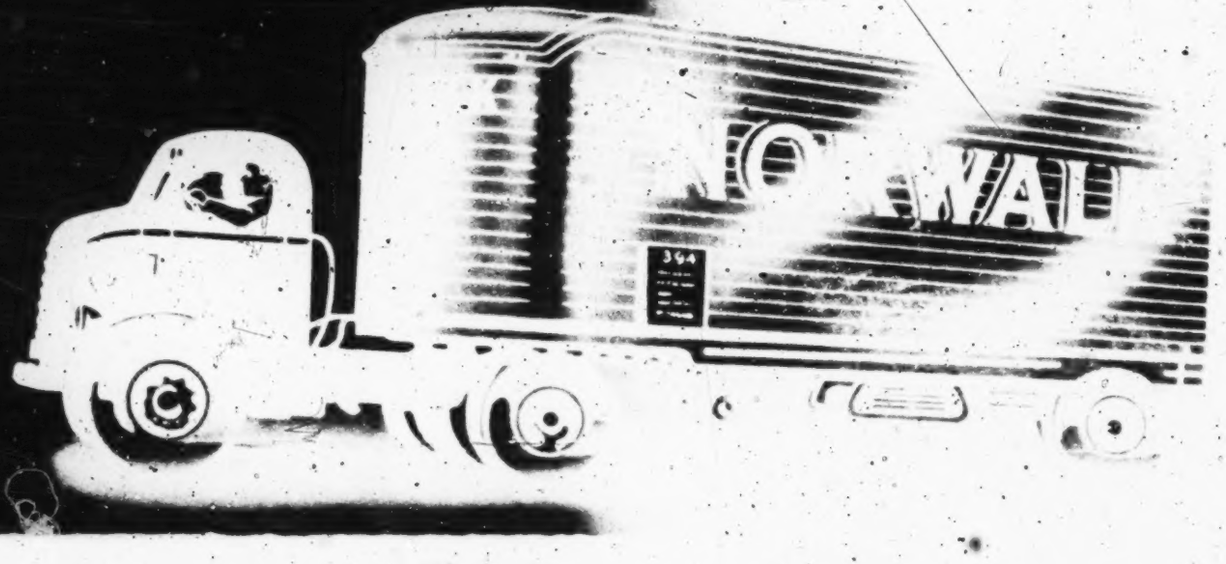

Lake Superior
WESTERN PENINSULA
MICHIGAN
MICHIGAN INDEX CITIES & TOWNS
Lake Superior
Whitefish Bay
North Channel
Mackinac Island
Milwaukee
Grand Rapids
Chicago
AROUND THE LAKE
Road Map
SINCLAIR
MICHIGAN


Lake Superior
MICHIGAN
Green Bay
Milwaukee
Grand Rapids
Chicago
AROUND THE LAKE
Road Map
SINCLAIR
MICHIGAN

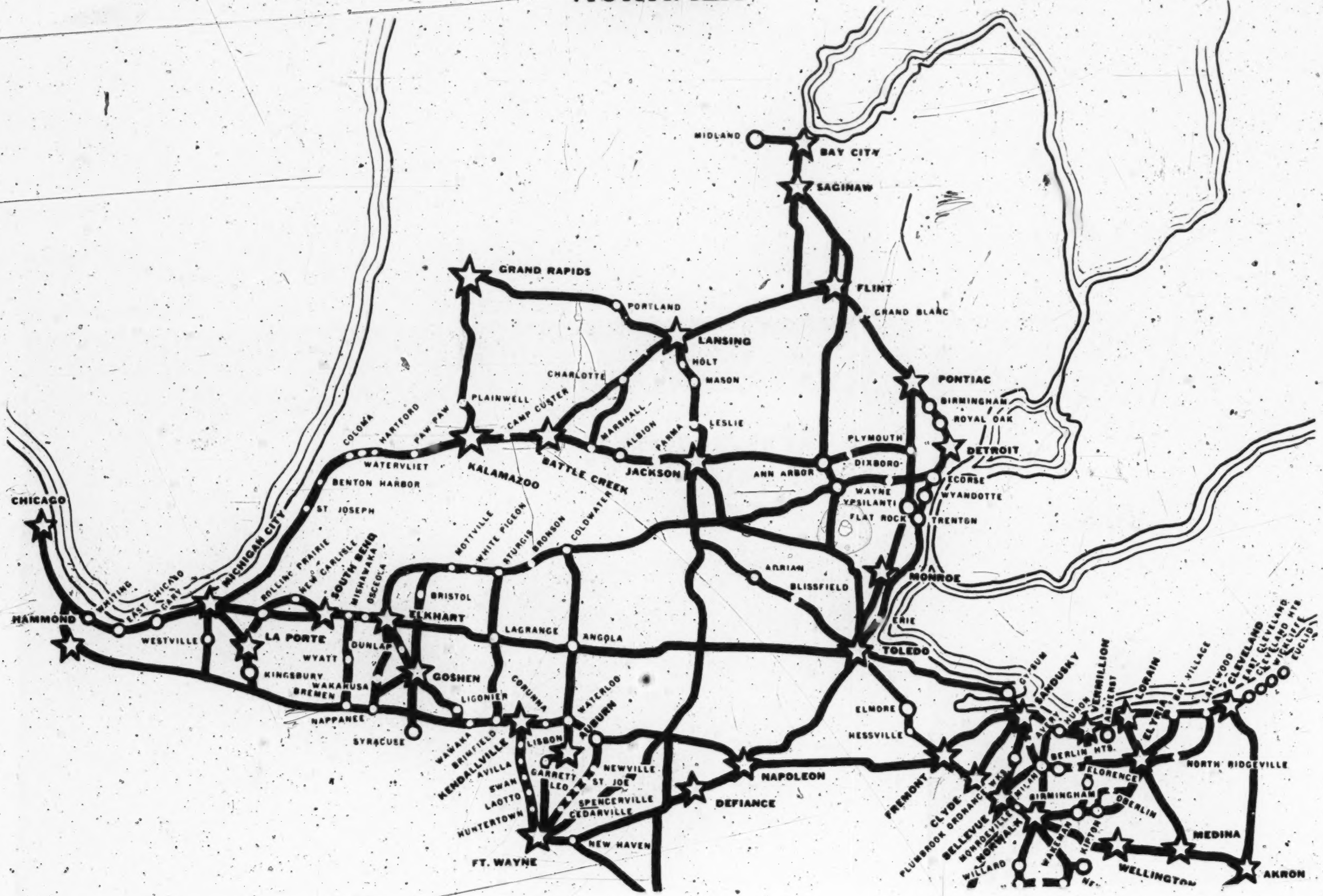
*Demands Service* . . . **NORWALK**

**DELIVERS**

**THE GOODS**



# NORWALK


MIDLAND
BAY CITY
SAGINAW
GRAND RAPIDS
PORTLAND
FLINT
GRAND BLANC
LANSING
HOLT
MASON
CHARLOTTE
PONTIAC
BIRMINGHAM
ROYAL OAK
PLAINWELL
CAMP CUSTER
MARSHALL
ALBION
PARMA
LESLIE
PLYMOUTH
DETROIT
COLOMA
HARTFORD
PAW PAW
WATERVLIET
KALAMAZOO
BATTLE CREEK
JACKSON
ANN ARBOR
DIXBORO
ECORSE
WYANDOTTE
BENTON HARBOR
WAYNE
YPSILANTI
FLAT ROCK
TRENTON
CHICAGO
ST JOSEPH
MICHIGAN CITY
MOTTVILLE
WHITE PIGEON
STURGIS
BRONSON
COLDWATER
ADRIAN
BLISSFIELD
MONROE
ROLLING PRAIRIE
NEW CARLISLE
SOUTH BEND
MISHAWAKA
OSCEOLA
BRISTOL
ELKHART
LAGRANGE
ANGOLA
ERIE
TOLEDO
HAMMOND
WHITING
EAST CHICAGO
GARY
WESTVILLE
LA PORTE
WYATT
DUNLAP
KINGSBURY
WAKARUSA
BREMEN
GOSHEN
LIGONIER
COLUMBIA
WATERLOO
AUBURN
NAPPANEE
SYRACUSE
WAWAKA
BRIMFIELD
KENDALLVILLE
AVILLA
SWAN
LAOTTO
HUNTERTOWN
LISBON
GARRETT
LEO
NEWVILLE
ST JOE
SPENCERVILLE
CEDARVILLE
NEW HAVEN
FT. WAYNE
DEFIANCE
NAPOLEON
ELMORE
HESSVILLE
FREMONT
CLYDE
PLUMBROOK ORDNANCE WKS
SELLEVUE
MONROEVILLE
NORWALK
WILLARD
MILAN
BERLIN HTS.
FLORENCE
BIRMINGHAM
OBERLIN
WAKEMAN
KIPTON
GYPSUM
SANDUSKY
AVERY
HURON
VERMILLION
AMHERST
LORAIN
ELYRIA
BAY VILLAGE
LAKEWOOD
CLEVELAND
EAST CLEVELAND
CLEVELAND HTS
WICKLIFFE
EUCLID
NORTH RIDGEVILLE
MEDINA
WELLINGTON
AKRON

1132 INTER-STATE MOTOR FREIGHT SYSTEM

DAILY DIRECT SERVICE

DISTRICT OF COLUMBIA

#Anacostia
#Belleview
#Benning
#Brookland
#Chevy Chase
#Congress Heights
#Georgetown
#Mount Rainier
#Tacoma Park
⊙#Washington

CONNECTICUT

Ø#Hartford
⊙#New Haven

DELAWARE

#Wilmington

ILLINOIS

Alton
Argo
Auburn Park
Austin
Belleville
Bellewood
Berwyn
Beverly Hills
Blue Island
Bowmansville
Broadview
Brookfield
Burnside
Burr Oak
Calumet City
⊙Chicago
Chicago Heights
Chicago Lawn
Cicero
Clearing
Colehour
Congress Park
Cragin
Dolton
Dunning
⊙East Moline
E. St. Louis
Edison Park
Englewood
Evanston
Evergreen Park
Fernwood
Forest Park
Galewood
Gardners Park
Grand Crossing
Granite City
Harvey
Hawthorne
Hegewisch
Irondale
Jefferson Park
Kensington
Madison
Mayfair
Maywood
Melrose Park
⊙Moline
Monsanto
Mont Clare
Morgan Park
Mount Greenwood
Niles Center
Oak Park
Park Ridge
Pullman
Ravenswood
Riverdale
River Forest
Riverside
•Rockford
⊙Rock Island
Rogers Park
Roseland
Roxana
⊙South Beloit
South Chicago
South Holland
•Springfield
Summit
Venice
Washington Heights
Ø†Waukegan
West Pullman
Wood River

INDIANA

⊙#Anderson
#Beech Grove
#Brightwood
#Broad Ripple
#Cambridge City
#Connersville
#Daleville
#East Chicago
Ø#Elkhart
⊙#Evansville
⊙#Fort Wayne
#Gary
#Hagerstown
#Hammond
#Indiana Harbor
⊙#Indianapolis

#Irvington
#Jeffersonville
#Kingsbury
Ø#Lafayette
#LaPorte
#Mars Hill Station
#Milton
#Mishawaka
#Moorefield
#Mount Summit
⊙#Muncie
#New Albany
#New Castle
Ø#Richmond
#Roby
⊙#South Bend
#South Port
#Speedway City
⊙#Terre Haute
#Whiting
#Yorktown

IOWA

⊙#Bettendorf
⊙#Davenport

KENTUCKY

#Beechmont
#Bellevue
#Covington
#Dayton
#Erlanger
#Fort Mitchell
#Fort Thomas
#Highland Park
#Latonia
⊙#Louisville
#Ludlow
#Newport
#St. Mathews
#Shively
#South Gate

MARYLAND

#Ammendale
#Arlington
⊙#Baltimore
#Beltsville
#Berwyn
#Bethesda
#Bladensburg
#Branchville
#Brentwood
#Canton
#Capitol Heights
#Catonsville
#Chevy Chase
#Clifton Heights
#Clifton Park
#College Park
#Curtis Bay
#Elkridge
#Ellicott City
#Essex
#Forest Park
#Guilford
#Gwynn Oak
#Halethorpe
#Highlandtown
#Howard Park
#Hyattsville
#Kensington
#Lansdowne
#Laurel
#Locust Point
#Mt. Ranier
#Mt. Washington
#Mt. Winans
#Middle River
#Muirkirk
#Overlea
#Pikesville
#Point Breeze
#Riverdale
#St. Dennis
#Silver Spring
#Sparrows Point
#Takoma Park
#Towson
#Walbrook
#Westport
#Woodlawn

MASSACHUSETTS

#Allston
#Arlington
#Belmont
⊙#Boston
#Brighton
#Brookline
#Cambridge
#Charlestown
#Chelsea
#Chicopee Falls
#Dorchester
#East Boston
#East Cambridge
#Everett
#Hyde Park
#Indian Orchard
#Jamaica Plains
#Lexington
#Lynn
#Malden
#Medford
#Melrose
#Milton
#Revere
#Roxbury
#Somerville
#South Boston
⊙#Springfield
#Waltham
#Watertown
#Woburn
⊙#Worcester

MICHIGAN

ØAdrian
Albion
Algonac
Allen
Allendale
Allen Park
Almont
Auble
Anchorville
⊙Ann Arbor
Argentine
Ashton
Augusta
Bancroft
Barryton
Batavia
⊙%Battle Creek
⊙Bay City
Belding
⊙Benton Harbor
Berkley
Big Beaver
Big Rapids
Birch Run
Birmingham
Blanchard
Blissfield
Bloomfield Hills
Borland
Bradley
Bridgeport
Brighton
Bronson
Brooklyn
#Buchanan
Burr Oak
Byron
⊙Cadillac
Cambridge Junction
Carrollton
Cascade
Cedar Springs
Center Line
Centerville
Ceresco
Charlotte
Chelsea
Chrysler Tank Arsenal
Clawson
Clio
Clyde
Coldwater
Coloma
Comstock
Cooper
Coopersville
Corinth
Corunna
Cutlerville
Dearborn
Dennison
⊙Detroit
Devereaux
De Witt
Dimondale
Disco
Dixboro
Drayton Plains
#Dundee
Durand
Eagle
East Detroit
East Lansing
ØEaton Rapids
Ecorse
Edgerton
Edmore
Elm
Eloise
Entrican
Erie
Essexville
Evart
Fair Haven
Farmington
Fenton
Ferndale
Ferrysburg
Flat Rock
⊙Flint
Fort Custer
Fowlerville
Francisco
Frankenmuth
Fruitport
Galesburg
Grand Blanc
⊙Grand Haven
Grand Ledge
⊙%Grand Rapids
Grandville
Grass Lake
Grattan
Greenville
Grosse Pointe Farms
Grosse Pointe Park
Grosse Pointe Village
Hamburg
Hamtramck
Hand
Hartford
Hartland
Highland
Highland Park
Hillsdale
⊙%#Holland
Holly
Holt
Howard City
Howell
Hudson Naval Arsenal
Imlay City
Inkster

⊙%Jackson
Jonesville
⊙%Kalamazoo
Laingsburg
Lakeview
Langston
⊙%Lansing
LaSalle
Lawrence
Lennon
Leoni
Leroy
Leslie
Lima Center
Lincoln Park
Linden
Lucas
†Manistee
Maple Hill
Marengo
Marine City
Marion (Osceola Co.)
Marne
Marshall
Martin
Marysville
ØMason
McBain
McBrides
Melvindale
Mendon
Michigan Center
†Midland
#Milan
Milford
Millbrook
Millett
Moline
ØMonroe
Morley
Morrice
Moscow
Mt. Clemens
Mt. Morris
†Mt. Pleasant
⊙%Muskegon
⊙%Muskegon Heights
Muttonville
Napoleon
New Baltimore
New Haven
New Hudson
#Niles
Northville
Nottawa
Novi
Nunica
Okemos
Onondaga
Oshtemo
Ottawa Lake
⊙Owosso
Palmyra
Parchment
Paris
Parma
Paw Paw
Pearline
Perry
Pierson
Pine Run
Plainwell
Pleasant Ridge
ØPlymouth
⊙Pontiac
⊙Port Huron
Portland
Potterville
Quincy
Rattle Run
Redford
Reed City
Remus
Richmond
River Rouge
Riverview
Rives Junction
Roberts Landing
Rochester
Rockford
Rockwood
Rogers Dam
Romeo
Rose Center
Roseville
Royal Oak
⊙Saginaw
St. Clair
St. Johns
⊙St. Joseph
Sand Lake
Sears
Selfridge Field
Shelbyville
Sibley
Sidney
Silver Lake
Six Lakes
Somerset
Somerset Center
South Rockwood
Spring Lake
Springport
Stanton
Stanwood
Stoney Corners
ØSturgis
Sylvan Center
Taylor Center
Tipton
Titus
Trenton
Troy
Tustin

Utica
Vandercook Lake
Van Dyke
Vernon
Vicksburg
Walled Lake
Warren
Washington
Waterford
Watervliet
Wayland
Wayne
Webberville
Weidman
West and Allen Roads (Wayne Co.)
West Windsor
Whitmore Lake
Williamston
Willow Run
Wixom
Wyandotte
Ypsilanti
Zilwaukee

MINNESOTA

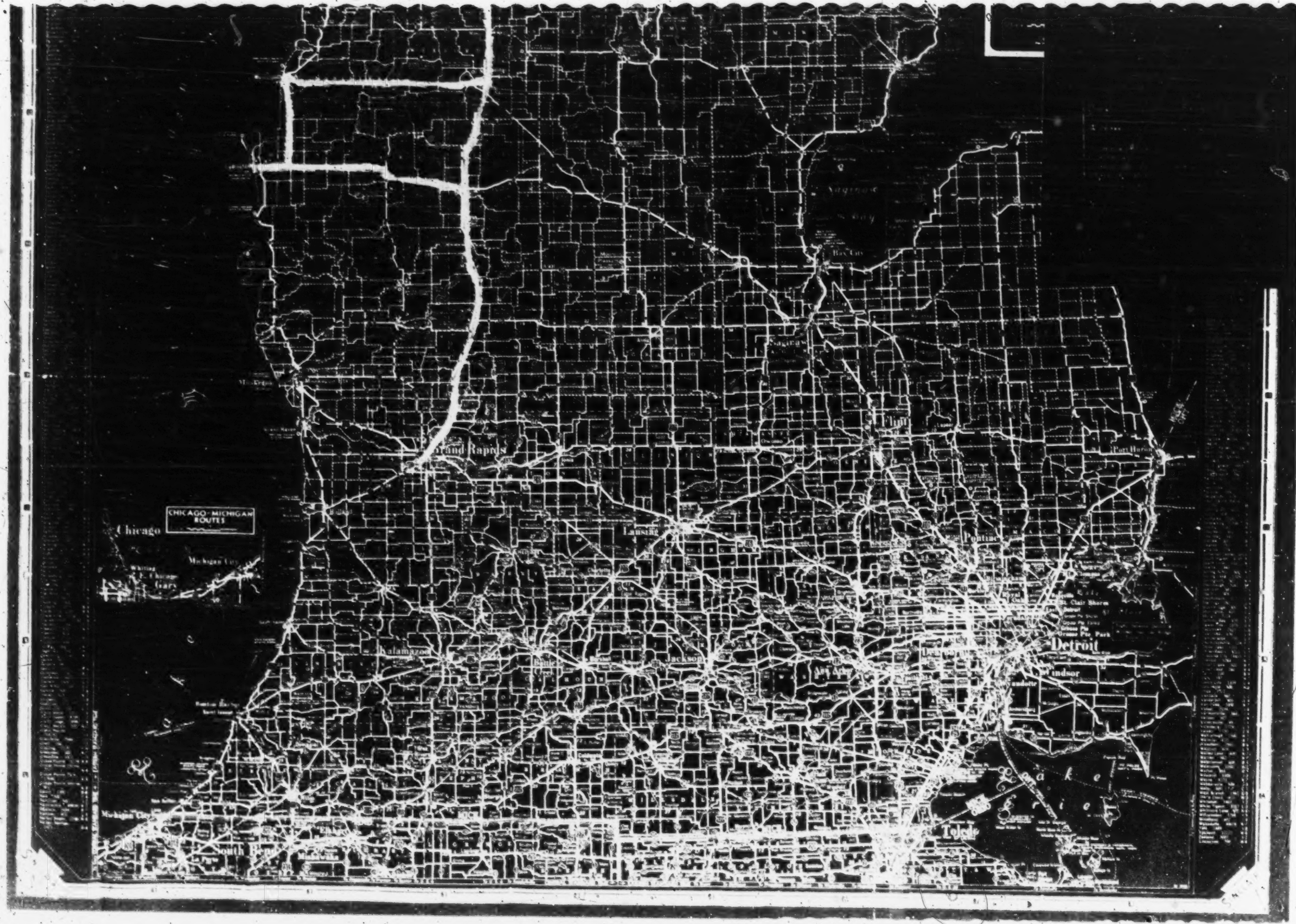
#Columbia Heights
#Hopkins
⊙#Minneapolis
#Minnesota Transfer
#Newport
#North St. Paul
#Robbinsdale
#St. Louis Park
⊙#St. Paul
#South St. Paul
#Twin City Ordnance Plant

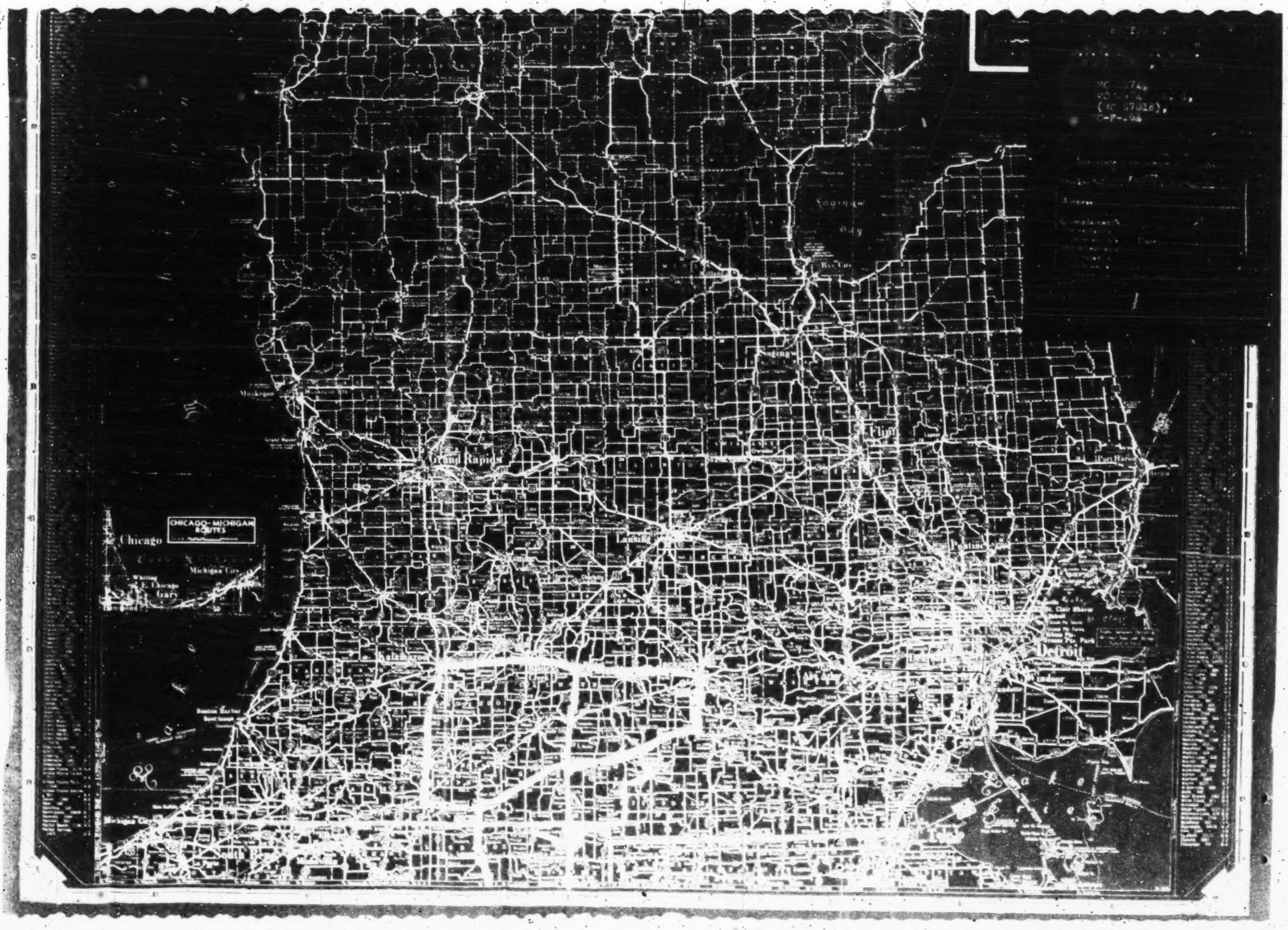
MISSOURI

#Anglum
#Brentmoore
#Brentwood
#Bridgeton
#Carondelet
#Carsonville
#Clayton
#Creve Coeur
#Ferguson
#Glendale
#Greenwood
#Jefferson Barracks
#Jennings
#Kinlock Park
#Kirkwood
#Lakewood
#Lambert Field
#Luxemburg
#Maplewood
#Normandy
#Oakland
#Old Orchard
#Overland
#Pattonville
#Pine Lawn
#Ramona Park
#Richmond Heights
#Robertson
⊙#St. Louis
#Shrewsbury
#Tuxedo Park
#University City
#Valley Park
#Webster Groves
#Wellston

NEW JERSEY

#Arlington
#Athenia
#Babbitt
#Bayonne
#Baywell
#Belleville
#Berkley Heights
#Bloomfield
#Bogota
#Bound Brook
#Carlstadt
#Carlton Hill
#Carteret
#Chrome
#Clifton
#Communipaw
#Coytesville
#Cranford
#Dunnellen
#East Newark
#East Orange
#East Paterson
⊙#East Rutherford
#Edgewater
#Elizabeth
#Elizabethport
#Fairview
#Fords
#Forrest Hill
#Fort Lee
#Garfield
#Glen Ridge
#Grantwood
#Guttenberg
#Hackensack
#Haledon
#Harrison
#Hasbrouck Heights
#Highland Park
#Hillside
#Hoboken
#Homestead
#Irvington
#Jersey City
#Kearney
#Keyport
#Leonia
#Linden


CHICAGO-MICHIGAN ROUTES
Chicago
Michigan City
Whiting
E. Chicago
Gary
Grand Rapids
Kalamazoo
Jackson
Lansing
Bay City
Saginaw
Pontiac
Port Huron
Detroit
Windsor
Lake Erie
Toledo
South Bend


CHICAGO-MICHIGAN ROUTES
Chicago
Michigan City
Whiting
E. Chicago
Gary
Grand Rapids
Muskegon
Saginaw
Saginaw Bay
Bay City
Flint
Port Huron
Detroit
Lake Erie

#Little Falls
#Little Ferry
#Llewelyn Park
#Lodi
#Lyndhurst
#Maaville
#Maplewood
#Matawan
#Maurer
#Maywood
#Metuchen
#Montclair
#Morsemere
⊙#Newark
#New Brunswick
#New Durham
#North Arlington
#North Bergen
#North Haledon
#Nutley
#Old Bridge
#Orange
#Palisade
#Palisades Park
#Parlin
#Passaic
#Paterson
#Perth Amboy
#Plainfield
#Port Newark
#Rahway
#Ridgefield
#Ridgefield Park
#Rochelle Park
#Roselle
#Rutherford
#Secaucus
#South Amboy
#South Orange
#South River
#Teterboro
◊⊙#Trenton
#Union
#Union City
#Weehawken
#Westfield
#West Orange
#Woodbridge
#Woodridge

NEW YORK

⊙Albany
Bay Ridge
Bensonhurst
Black Rock
Blasdell
Bronx
Brooklyn
⊙Buffalo
Bushwick
Cheektowaga
City Island
Cohoes
Cortland
Delmar
Depew
East Buffalo
East Solvay
East Syracuse
Echota
Elsmere
Fayetteville
Green Island
Greenpoint
Harriet
Kenmore
Kensington
Lackawanna
Lancaster
Lockport
Long Island City
Manhattan
Menands
Munson
New Hartford
⊙New York
◊Niagara Falls
North Tonawanda
†Oneida
#Rensselaer
⊙Rochester
†Rome
Schenectady
Scotia
Snyder
Solvay
Staten Island
⊙Syracuse
Tonawanda
Troy
⊙Utica
Waterford
Watervliet
Whitesboro
Whitestone
Williamsville
Wurlitzer

OHIO

⊙#Akron
◊#Alliance
#Amherst
#Archbold
◊#Ashland
#Atlas
#Avondale
#Barberton
#Bedford
#Bexley
#Bloomdale
#Bond Hill
◊#Bowling Green
#Bratenahl
#Brighton Station

≠Brooklyn Heights
≠Brooklyn Heights Village
O≠Bryan
≠Camp Chase
≠Campbell
⊙≠Canton
≠Carthage
≠Cheviot
⊙≠Cincinnati
⊙≠Cleveland
≠Cleveland Heights
≠Clintonville
≠College Hill
≠Collinwood
⊙≠Columbus
≠Cuminsville
≠Cuyahoga Falls
≠Cuyahoga Heights
≠Cuyahoga Heights Village
≠Cygnet
≠Dalton
⊙≠Dayton
≠Deer Park
≠Defiance
≠Delta
≠East Canton
≠East Cleveland
≠East Greenville
≠Ellet
≠Elmwood Place
O≠Elyria
≠Euclid
≠Euclid Heights
≠Euclid Village
≠Evanston
≠Fairmont
O≠Findlay
O≠Fostoria
O≠Fremont
≠Garfield Heights
≠Girard
≠Grafton
≠Grandview
≠Greentown
≠Groesbeck
≠Gypsum
≠Hartwell
≠Hyde Park
≠Ivorydale
≠Kennedy Heights
≠Lakewood
O≠Lima
≠Lindale
≠Lindale Village
≠Lockland
O≠Lorain
≠Louisville
≠Madisonville
≠Malvern
O≠Mansfield
≠Maple Heights
≠Mariemont
≠Massillon
≠Mayfield Heights
≠Medina
≠Minerva
≠Montpelier
≠Moraine
≠Moraine City
≠Mt. Airy
≠Mt. Auburn
≠Mt. Healthy
≠Mt. Lookout
≠Napoleon
≠Navarre
≠Newburgh Heights
≠Newburgh Heights Village
≠Niles
≠North Baltimore
≠North Canton
≠Northfield
≠North Randall
≠North Ridgeville
≠Northside
≠Norwood
≠Oakley
≠Orrville
≠Parkman
≠Parma
≠Perrysburgh
≠Pleasant Ridge
≠Plumbrooke Ordnance Works
≠Port Clinton
≠Price Hill
≠Reading
≠Red Bank
≠Richmond Heights
≠Ridgeville
≠Riverside
≠Rocky River
≠Rossford
≠St. Bernard
≠Sandusky
≠Saylor Park
≠Sebring
≠Shaker Heights
≠Sharonville
≠Silverton
≠Smithville
≠South Amherst
≠Struthers
≠Stryker
≠Swanton
≠Sylvania
O≠Tiffin
⊙≠Toledo
≠Uniontown
≠University Heights
≠Upper Arlington
≠Valley View
≠Van Buren
≠Vaughan
≠Vermillion
≠Walnut Hills


# DIRECT POINTS served in OHIO, INDIANA, ILLINOIS

## from the State of MICHIGAN

## OHIO

Akron, Ohio
Amherst, Ohio
Avery, Ohio
Avon, Ohio
Bay Village, Ohio
Bellevue, Ohio
Berlin Hts., Ohio
Berlinville, Ohio
Birmingham, Ohio
Cleveland, Ohio
Cleveland Hts., Ohio
Clyde, Ohio
Collins, Ohio
Defiance, Ohio
East Cleveland, Ohio
Elmore, Ohio
Elyria, Ohio
Euclid, Ohio
Fitchville, Ohio
Florence, Ohio
Fremont, Ohio
Greenwich, Ohio
Hessville, Ohio
Huron, Ohio
Kipton, Ohio
Lakewood, Ohio
Lorain, Ohio
Mansfield, Ohio
Medina, Ohio
Milan, Ohio
Monroeville, Ohio
Napoleon, Ohio
New London, Ohio
North Ridgeville, Ohio
Norwalk, Ohio
Oberlin, Ohio
Plumbrook Ord. Works
Sandusky, Ohio
Shelby, Ohio
South Amherst, Ohio
Toledo, Ohio
Townsend, Ohio
Vermillion, Ohio
Wakeman, Ohio
Westlake, Ohio
Wellington, Ohio
Wickliffe, Ohio
Willard, Ohio

## INDIANA

Auburn, Ind.
Avilla, Ind.
Benton, Ind.
Bremen, Ind.
Brimfield, Ind.
Bristol, Ind.
Butler, Ind.
Cedarville, Ind.
Gorunna, Ind.
Dunlap, Ind.
East Chicago, Ind.
Elkhart, Ind.
Fort Wayne, Ind.
Garrett, Ind.
Gary, Ind.
Goshen, Ind.
Huntertown, Ind.
Indiana Harbor, Ind.
Hammond, Ind.
Kendallville, Ind.
Kingsbury, Ind.
Laotto, Ind.
La Porte, Ind.
Leo, Ind.
Ligonier, Ind.
Lisbon, Ind.
Michigan City, Ind.
Mishawaka, Ind.
Nappanee, Ind.
New Carlisle, Ind.
New Haven, Ind.
Newville, Ind.
Osceola, Ind.
Rolling Prairie, Ind.
St. Joe, Ind.
South Bend, Ind.
Spencerville, Ind.
Syracuse, Ind.
Swan, Ind.
Wakarusa, Ind.
Waterloo, Ind.
Wawaka, Ind.
Whiting, Ind.
Wyatt, Ind.

## ILLINOIS

Chicago, Ill.
Harvey, Ill.

* Terminal

Phone [illegible] Information

Ø#Warren
#Warrensville Heights
#Wauseon
#Welshfield
#West Park
#Westwood
#Wickcliff
#Winton Place
Ø#Wooster
#Wyoming
Ø#Youngstown

PENNSYLVANIA

*#Aspinwall
*#Avalon
*#Beechview
*#Bellevue
*#Ben Avon
*#Blackhawk
*#Bloomfield
*#Braddock
#Bridesburg
*#Bridgeville
#Burholme
#Bustletown
#Byberry
*#Carnegie
*#Carrick
#Chestnut Hill
*#Coraopolis
*#Crafton
*#Crescentville
*#Dixmont
*#Dormont
*#Duquesne
*#East Liberty
*#East Pittsburgh
*#Edgewood
*#Emsworth
⊙#Erie
*#Etna
#Fern Rock
#Fox Chase
#Frankford
#Germantown
#Girard Point
*#Glassport
*#Glenfield
*#Glenshaw
#Greenwich Point
*#Harmarville
Ø#Harrisburg
*#Hays
*#Haysville
*#Hazelwood
#Holmesburg
*#Homestead
#Kensington
#LaMott
*#Large
#Lawndale
#Logan
#Manayunk
*#McKeesport
*#McKees Rocks
#Milbourne
*#Milvale
#Mt. Airy
*#Mt. Lebanon
*#Mt. Oliver
*#Munhall
*#Neville Island
Ø#New Cumberland
*#North Braddock
#Oak Lane
*#Oakmont
#Olney
#Overbrook
#Pencoyd
*#Perrysville
⊙#Philadelphia
*#Pitcairn
⊙#Pittsburgh
#Point Breeze
#Port Richmond
*#Rankin
#Roxborough
*#Shadyside
*#Sharpsburg
#Somerton
*#Southside
#Summerdale
*#Swissvale
#Tabor
#Tacony
#Thornburg
#Tioga
#Torresdale
*#Turtle Creek
#U. S. Navy Yard
*#Verona
*#West End
*#West View
*#Whitaker
*#Wilkinsburg
#Wissinoming

RHODE ISLAND

Ø#Providence

VIRGINIA

#Arlington

WISCONSIN

#Allis
⊙#Beloit
#Cudahy
#Fox Point
#&Janesville
Ø#†Kenosha
#Layton Park
⊙#Milwaukee
#North Milwaukee
Ø#†Racine

| | |
|---|---|
| #St. Francis | #West Allis |
| •#Shorewood | #West Milwaukee |
| #South Milwaukee | #Whitefish Bay |
| #Wauwatosa | |

Leger.d.—⊙ Terminal. • Truckload only handled direct. # Interstate traffic only. % Refrigerator service from Chicago, Ill. & Direct service limited to shipments of 10,000 lbs. or more. † Direct service on interstate shipments of 5,000 lbs. or more. Ø Cartage point.

Consult our Terminal Managers or Brawn Sproul, General Traffic Manager, 2866 Penobscot Bldg., Detroit, Mich., for information on various other points served.

Receivers of Export and Import Freight for Judson-Sheldon Corp., Foreign Freight Forwarders.

1133 *Exhibit No. 21*

This Agreement, made this First day of November 1941, between the Pennsylvania Railroad Company, hereinafter called "Railroad" party of the first part, and The Willett Company of Indiana, Inc., of Indianapolis, Indiana, hereinafter called "Trucker", party of the second part, witnesseth:

That, in consideration of the terms and conditions hereinafter set forth to be observed and performed by each of the parties hereto, it is mutually covenanted, stipulated and agreed by the parties hereto as follows:

First: Trucker, who is engaged in the trucking business as an original private and independent contractor, agrees:

(1) To accept from Railroad at its stations in the following cities and towns in the States of Indiana and Michigan: Ft. Wayne, Ind., Kendallville, Ind., Rome City, Ind., Wolcottville, Ind., LaGrange, Ind., Howe, Ind., Sturgis, Mich., Nottawa, Mich., Mondon, Mich., Vicksburg, Mich., Kalamazoo, Mich., all less-than-carload freight, as well as mail, and express (all hereinafter referred to as "freight"), offered by Railroad to Trucker, and safely to transport and deliver it at the stations of Railroad in said cities and towns, including loading and unloading Trucker's vehicles and incidental collection from and delivery to the premises of Railroad's patrons; all to the satisfaction of Railroad.

(2) To secure and deliver proper receipts and shipping documents and also to collect and deliver all charges and amounts due with respect to such freight; also to accept from Railroad, safely transport, and deliver such other funds as may be delivered to Trucker from time to time by the authorized representative of Railroad; all to the satisfaction of Railroad.

(3) That no portion of the money paid to Trucker for services under this agreement, shall, by any device or arrangement whatsoever, be directly or indirectly paid or refunded to any shipper, consignee or any one whomsoever in any way interested in the freight handled or transported under this agreement.

(4) To comply strictly at all times with the Railroad's rules and regulations and with its duly filed tariffs and supplements thereto and reissues thereof, and with all other rules, regulations and tariffs and all laws applicable to operations and service to be performed by Trucker hereunder.

(5) To be responsible for, and to protect, save harmless and indemnify Railroad from and against all fines, penalties, loss, damage, cost and expense suffered or sustained by Railroad or for which Railroad may be held or become liable by reason of (a) loss or destruction of or damage or delay to property and freight in the handling, collection or delivery thereof hereunder, or loss or destruction of or damage or delay to property and freight while said property or freight is in Trucker's care, custody or possession hereunder; (b) injury (including death) to persons or property or other causes whatsoever, in the event an attempt should be made to hold Railroad liable therefor, in connection with Trucker's business or operations hereunder; (c) violation of any law, rule or regulation of public authority with respect to the services of
1134 Trucker hereunder; (d) the issuance of any false or fraudulent bills of lading or the giving or receiving of any false or fraudulent receipts for any freight by Trucker, or by Trucker's agents, servants or employees; (e) failure of Trucker to make collections and remittances to Railroad as provided in this agreement, and (f) theft, embezzlement, defalcation, misrepresentation or falsification by any device whatsoever on the part of Trucker or Trucker's agents, servants or employees.

(6) At Trucker's own expense to provide for insurance or otherwise, in an amount, in a manner, and with a company satisfactory to Railroad, fully to meet the requirements of any compensation act, plan, or legislative enactment in connection with the death, disability, or injury of Trucker, Trucker's officers, agents, or employees arising either directly or indirectly out of the work or services to be performed hereunder, also Trucker's legal liability for death of or disability or injury to third parties and damage to property of third parties; and Trucker admits, and accepts exclusive responsibility on Trucker's part for any and all taxes, contributions, or any payment whatever for old age or other pensions, unemployment compensation insurance, annuities, or any benefits whatever of a social security nature imposed now, or hereafter, by any State or Federal statute or authority, or arising thereunder with respect to Trucker, Trucker's employees, or their wages, salaries, or other remuneration or compensation.

(7) At Trucker's own expense to provide for bonds with corporate surety satisfactory to Railroad, fully to indemnify Railroad against theft, embezzlement, defalcation, misrepresentation,

or falsification on the part of Trucker's agents, servants, or employees.

(8) Railroad shall have the right to examine the accounts, records, books, and papers of Trucker pertaining in any way to operations or conditions incident to the service to be performed by Trucker hereunder.

(9) That neither this contract nor any of the work to be performed by Trucker hereunder shall be assigned, transferred, or sublet by Trucker, in whole or in part, without written consent of Railroad first had and obtained.

Second: Railroad agrees:

(1) To pay Trucker, in full for the transportation and handling of freight and all other services rendered by Trucker hereunder, as follows:

(a) For a tractor and semitrailer with a maximum carrying capacity of seven tons at the rate of Three Hundred Thirty-Five dollars ($335.00) per calendar month and in addition Six cents (6¢) per mile actually operated in said service as registered by a reliable meter.

(b) For equipment substituted by Trucker, when the regular equipment used in this service is temporarily withdrawn for repairs or for other reasons, Railroad will make the same payment as if the regular equipment has been used.

(c) For extra equipment, which may be hired by Trucker to meet the needs of said service from time to time when directed by the authorized representative of Railroad, Railroad will reimburse Trucker for the actual amount paid by Trucker for the hire of said extra equipment.

1135 Third: It is mutually agreed that this Agreement shall become effective from and after the _____ and shall continue in effect subject to termination upon thirty (30) days' written notice from either party to the other; Provided, that Railroad may terminate this Agreement at any time immediately upon written notice to Trucker by reason of any adverse legislation, order or rule of any public authority, or in the event Trucker's services hereunder shall be unsatisfactory to Railroad.

In witness whereof, the parties hereto have caused this Agreement to be duly executed the day and year first hereinbefore written.

THE PENNSYLVANIA RAILROAD COMPANY,
By J. M. SYMES, *General Manager.*

P. J. HARGES.

THE WILLETT COMPANY OF INDIANA, INC.,
By JOS. P. MCARDLE, *Vice President.*

B. B. YOUNG.

Served Sept. 14, 1942

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. Otherwise, at the expiration of said period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions have been seasonably filed by other parties, or the order has been stayed or postponed by the Commission.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, the issuance of which will have been authorized upon compliance with provisions of the Interstate Commerce Act and rules thereunder, has actually been issued. Futhermore, it should not be assumed that the order recommended has become effective as the order of the Commission until such time as a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-2815 (Sub-No. 6)

THE WILLETT COMPANY OF INDIANA, INC., EXTENSION—FORT WAYNE, IND., MACINAW CITY, MICH.

Submitted ———. Decided ———.

Public convenience and necessity found to require operation subject to certain conditions, by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, over specified routes, between Fort Wayne, Ind., and Macinaw City, Mich., serving intermediate and off-route points which are stations on the rail line of the Pennsylvania Railroad Company. Issuance of a certificate, subject to conditions, approved upon compliance by applicant with certain requirements.

Harry E. Yockey, Kirkwood Yockey, and Earl W. Munshaw for applicant.

Claude H. Anderson, K. F. Clardy, Robert Des Roches, Fred I. King, George O. Cowan, W. J. Guenther, and Frank C. Devlin for protestants.

Oscar Lindstrand for intervener supporting applicant.

*Report and order*

Recommended by Walter W. Bryan, Examiner

By application filed September 8, 1941, the Willett Company of Indiana, Inc., of Chicago, Ill., seeks a certificate of public
1137 convenience and necessity authorizing extension of operations in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, between Fort Wayne, Ind., and Macinaw City, Mich., serving the intermediate and off-route points which are stations on the rail line of the Pennsylvania Railroad Company and over the routes set forth in the appendix.

The application was referred to joint board No. 23 for hearing and recommendation of an appropriate order thereon. The joint board having failed to agree as to its recommendations, the matter has been duly referred to the examiner for further appropriate proceedings. Hearing was held on February 10 and 11, 1942, at Indianapolis, Ind., and June 1 and 2, 1942, at Lansing, Mich. Certain motor carriers operating in the affected territory oppose the granting of the application.

Applicant was organized in 1934 under the laws of Indiana. Its entire capital stock is owned by the American Contract & Trust Company, a wholly owned subsidiary of the Pennsylvania Railroad Company, hereinafter termed the railroad.

Pursuant to its "grandfather" application in No. MC–2815 and authority granted in Willett Company of Indiana, Inc., Extension—Ill., Ind., and Ky., 21 M. C. C. 405; also by a certificate issued to it in No. MC–2815 (Sub-Nos. 3, 4, and 5), applicant now performs a common carrier service transporting general commodities over highways paralleling the railroad, and serves only stations on the rail line of the railroad. All shipments move under bills of lading issued by the railroad and the service is confined to transportation which is auxiliary to and supplemental of the rail service. The existing authority embraces routes over highways paralleling many of the railroad's routes in Indiana, including service to some of the larger points, such as South Bend, Fort Wayne, Logansport, Indianapolis, and Terre Haute, Ind., also service to Chicago, Ill., Louisville, Ky., and St. Louis, Mo. The proposed routes connect with applicant's existing routes at Fort Wayne.

Applicant proposes herein to transport by motor vehicle less-than-carload freight originating on the lines of the railroad or its connections and proposes a service which is auxiliary to and supplemental of the rail service now being rendered by the railroad on its various lines extending from Fort Wayne through

Kalamazoo to Grand Rapids, thence north of Grand Rapids to Macinaw City. The above-mentioned traffic will be transported by rail between key or break-bulk stations and thence by truck to the intermediate or way stations. Conversely, applicant would collect freight at the way stations and transport it to the key stations for movement beyond by rail.

Operations would be conducted daily, except Sunday under regular schedules coordinated with those of the railroad. The railroad would assume responsibility to the shipper for the transportation of the freight throughout the entire movement. The railroad would issue bills of lading, publish rates, collect all charges, adjust claims, solicit traffic and contact the public.

The proposed operation will be conducted in the same manner and under the same conditions as those operations now conducted by applicant over its present authorized routes, 1138 all of which were considered and discussed at some length by the Commission, division 5, in Willett Company of Indiana, Inc., Extension—Ill., Ind., and Ky., supra, and, therefore, no further discussion along this line is necessary. However, in the above-mentioned case, division 5 attached certain conditions to the authority granted with a view of insuring that the authorized transportation would not be a duplication of and in competition with existing highway service. One of these conditions was as follows:

Shipments transported by applicant shall be limited to those which it receives from or delivers to the railroad under a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail.

The above condition had been imposed by division 5 in granting a motor carrier authority to perform a service auxiliary to and supplemental of rail service in Kansas City S. Transport Co., Inc., Com. Car. Application, 10 M. C. C. 221. Subsequently, upon oral argument in the latter proceeding, 28 M. C. C. 5, the Commission modified these requirements to permit the motor carrier to transport traffic which had not received a prior or subsequent rail haul.

In th instant case, the railroad proposes to establish two key points, namely, Fort Wayne and Grand Rapids, as points of distribution of its less-than-carload freight. The rail service between and into these two points is frequent and the amount of tonnage is heavy, whereas the points intermediate thereto receive less tonnage and less frequent service. This is likewise true to the points north of Grand Rapids, with the exception of Cadillac, Traverse City, and Petoskey. All of the points north of Grand Rapids are small towns ranging from populations of 200 to 1,500. The present rail service into these points is very

infrequent. To some points it is an every-other-day service and to other points it is a tri-weekly service. It is the purpose of the proposed operation to render a more frequent and faster service to the above points by motor vehicle.

The railroad will continue its rail service to all of these points in transporting carload freight but will discontinue the operation of the "peddlar car" on the local freight trains. By eliminating the "peddlar cars" it will enable the railroad to release a number of rail cars to be used in through-train service; will also enable the railroad to reduce its transit time to the various ways stations from 24 to 48 hours; will eliminate over 31,000 car-miles per month; will increase the efficiency of the railroad by eliminating the expense of switching the "peddlar cars" to and from the freight platform; and will result in heavier loading of cars by the consolidation of less-than-carload shipments into one car for each key point. The above efficiency in operation will be accomplished without adversely affecting the employees of the railroad.

Supplementing the evidence of applicant and railroad employees, 42 shipper witnesses representing various businesses at points located on the proposed routes testified as to the necessity for and the convenience of the considered services. In substance, their testimony is that they are now using the rail service in both carload and less-than-carload shipments. The present rail service on less-than-carload shipments is slow and the witnesses state that if the service proposed herein would expedite the movement of these less-than-carload shipments to their places of business, then such service would be a decided convenience and necessity to them.

1139

Various protestant motor carriers submitted evidence showing that their routes of operation parallel or traverse certain of the routes of applicant and that they serve practically all of the points on such routes. They assert that their present facilities and services are adequate and efficient and that they are able, ready, and willing to supplement their present equipment and facilities if traffic requirements should demand. They contend that they are willing to coordinate their services with the railroad in rendering the proposed service, but that the railroad has not seen fit to secure their services in coordinated rail and motor service between the points involved here, and they take the position that the existing motor carriers in the considered territory should be afforded opportunity to improve their present services and facilities before authorization for new service is granted. The evidence indicates that there are at least four motor carriers rendering a daily service between most of the points here involved. In addition to the testimony of the above witnesses for protestants, 15 shipper witnesses representing various businesses at points

located on the proposed routes, principally north of Grand Rapids, testified in support of the protestant motor carriers and in substance stated that they were now using both rail and motor carriers for their transportation needs. However, the majority of these shippers were using largely motor carrier service. They testified that the present services were satisfactory and they were not seeking additional transportation services.

Similar contentions on the part of protestants have been advanced in other like cases before the Commission. Especially in the Kansas City Southern case, supra, and what the Commission stated in that decision should apply equally well here.

Upon consideration of all evidence of record, the examiner concludes that the record amply warrants the granting of the authority sought subject to the conditions imposed by the Commission in Kansas City S. Transport Co., Inc., Com. Car. Application, supra.

The examiner finds that present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between the points and over the routes shown in the appendix attached hereto and made a part hereof, serving intermediate and off-route points which are stations on the rail line of the Pennsylvania Railroad Company, as indicated in the appendix, subject to the following conditions:

1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of the Pennsylvania Railroad Company, hereinafter called the railroad.

1140 2. Applicant shall not serve any point not a station on a rail line of the railroad.

3. No shipments shall be transported by applicant as a common carrier by motor vehicle between any of the following points or through or to or from more than one of said points: Fort Wayne, Ind., and Grand Rapids, Mich.

4. All contractual arrangements between applicant railroad and the American Contract & Trust Company shall be reported to the Commission and shall be subject to revision, if and as the Commission may find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as the Commission in the future may find it necessary to impose in order to restrict applicant's operation to service which is auxiliary to, or supplemental of, rail service.

The examiner further finds that applicant is fit, willing, and able properly to perform such service and to conform to the provisions of the act and the requirements, rules, and regulations of

the Commission thereunder; and that an appropriate certificate should be granted subject to the above conditions.

In view of the findings herein, the examiner recommends that the appended order be entered.

By Walter W. Bryan, Examiner.

(Signature) WALTER W. BRYAN.

1141 APPENDIX

PROPOSED ROUTES

Route No. 1: Between Fort Wayne, Ind., and Grand Rapids, Mich.: From Fort Wayne over Indiana Highway 3 to Kendallville, Ind., thence over U. S. Highway 6 to junction with Indiana Highway 9; thence over Indiana Highway 9 to junction with Michigan Highway 78; thence over Michigan Highway 78 to junction with Michigan Highway 86, near Nottawa; thence over Michigan Highway 86 to Nottawa; thence over County Roads, through Mendon and Vicksburg to junction with U. S. Highway 131 at Schoolcraft; thence over U. S. Highway 131 to Grand Rapids. Return over the same route.

Intermediate points to be served: Wallen, Huntertown, La Otto, Avilla, Kendallville, Rome City, Wolcottville, LaGrange, and Howe, Ind., Sturgis, Nottawa, Mendon, Vicksburg, Kalamazoo, County Spur, Plainwell, Martin, Shelbyville, Wayland, and Moline, Mich. No off-route points to be served.

Route No. 1a: From Kendallville to Rome City, Ind., over County Roads. No service to intermediate or off-route points.

Route No. 1b: From Nottawa, Mich., over Michigan Highway 86 to Three Rivers, thence over U. S. Highway 131 to Schoolcraft, Mich. No service to intermediate or off-route points.

Route No. 2: Between Grand Rapids and Cadillac, Mich. From Grand Rapids over U. S. Highway 131 to Cadillac, and return over the same route. Intermediate points to be served: Rockford, Cedar Springs, Sand Lake, Pierson, Howard City, Morley, Stanwood, Big Rapids, Paris, Reed City, Orono, Ashton, and LeRoy, Mich. Off-route point to be served. Tustin.

Route No. 2a: From Grand Rapids over County Roads, through Comstock Park and Belmont to junction with U. S. Highway 131 north of Grand Rapids. Intermediate point to be served: Belmont. No off-route points to be served.

1142 Route No. 3: Between Cadillac and Mackinaw City, Mich.: From Cadillac over U. S. Highway 131 to Petoskey, thence over U. S. Highway 31 to Mackinaw City, and return over the same route. Intermediate points to be served: Manton, Fife Lake, Kalkaska, Antrim, Mancelona, Alba, Boyne Falls, Petoskey,

Bay View, Conway, Oden, Alanson, Brutus, Pellston, Levering, and Carp Lake, Mich. Off-route points to be served: South Boardman, Elmira and Walloon Lake.

Route No. 3a: From the junction of U. S. Highway 31 and Michigan Highway 131 north of Bay View, thence over Michigan Highway 131 to Harbor Springs, thence over Michigan Highway 131 and County Roads to Conway, Mich. Intermediate points to be served: Kegomic, Wequetonsing and Harbor Springs, Mich. No off-route points to be served.

Route No. 4: Between Cadillac and Traverse City, Mich.: From Cadillac over U. S. Highway 131 to Walton, thence over County Roads to Summit City, thence over County Road to junction with Michigan Highway 113, thence over Michigan Highway 113 to Kingsley, thence over County Road to Mayfield, and return over the same route to Kingsley, thence over Michigan Highway 113 to junction with Michigan Highway 37, thence over Michigan Highway 37 to the junction with U. S. Highway 31, thence over U. S. Highway 31 to Traverse City, and return over the same route. Intermediate points to be served: Manton, Walton, Summit City, Kingsley, and Mayfield. No off-route points to be served.

Route No. 4a: From Walton over Michigan Highway 113 to junction with Michigan Highway 37, thence over Michigan Highway 37 to junction with U. S. Highway 31, thence over U. S. Highway 31 to Traverse City. No service to intermediate or off-route points.

1143 Route No. 5: Between Cadillac and Falmouth, Mich.: From Cadillac over Michigan Highway 55 to Lake City, thence over Michigan Highway 55 and County Roads to Falmouth, and return over the same route. Intermediate points to be served: Lake City. No off-route points to be served.

Route No. 5a: From Cadillac over Michigan Highway 55 and County Roads through Lucas to Falmouth. No service to intermediate or off-route points.

Route No. 6: Between Grand Rapids and Muskegon, Mich.: From Grand Rapids over U. S. Highway 16 to Coopersville, thence over County Roads, through Conklin, Ravenna, and Sullivan to junction with Michigan Highway 46, thence over Michigan Highway 46 to junction with U. S. Highway 31, thence over U. S. Highway 31 to Muskegon, and return over the same route. Intermediate points to be served: Ravenna and Conklin. No off-route points to be served.

Route No. 6a: From Grand Rapids to Muskegon over U. S. Highway 16. No service to intermediate or off-route points.

Route No. 7: Between Lake City and Manton, Mich.: From Lake City over Michigan Highway 66 to its junction with Michigan Highway 42, thence over Michigan Highway 42 to Manton,

and return over the same route. No service to intermediate or off-route points.

1144 Recommended by Walter W. Byran, Examiner.

(Signature) WALTER W. BYRAN.

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the day of ——, A. D. 1942

No. MC–2815 (Sub-No. 6)

THE WILLETT COMPANY OF INDIANA, INC., EXTENSION—FORT WAYNE, IND., MACKINAW CITY, MICH.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by joint board No. 23 and duly referred to the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, that upon full compliance with all requirements of sections 215 and 217 of the Interstate Commerce Act, and with the rules and regulations thereunder, a certificate be issued to applicant authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities described, and in the manner described in the findings in said report.

It is further ordered, that the application in all other respects be, and it is hereby, denied.

And it is further ordered, that this order shall be effective

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By the Commission, division 5.

[SEAL] W. P. BARTEL, *Secretary.*

1145 ORDER

INTERSTATE COMMERCE COMMISSION

No. MC 2815 (Sub No. 6)

THE WILLETT COMPANY OF INDIANA, INC., EXTENSION—FORT WAYNE, IND., MACINAW CITY, MICH., CHICAGO, ILL.

In the matter of request for postponement of date for the filing of exceptions to the recommended order.

Present: William E. Lee, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon consideration of the record in the above-entitled case and upon consideration of said request:

It is ordered, that the date for the filing of exceptions to the recommended order of the examiner be, and it is hereby, extended to October 31, 1942.

Dated at Washington, D. C., this 21st day of September A. D. 1942.

By the Commission, Commissioner Lee.

W. P. BARTEL, *Secretary.*

1148 BEFORE THE INTERSTATE COMMERCE COMMISSION

MS 2815—Sub. No. 6

IN THE MATTER OF THE APPLICATION OF THE WILLETT COMPANY OF INDIANA, INC., EXTENSION FORT WAYNE—MACKINAW CITY

*Exceptions of Protestants Inter-State Motor Freight System and Parker Motor Freight*

Oct. 29, 1942

(Figures in parentheses refer to pages of the printed record, except as the context clearly indicates otherwise.)

Now come the protestants, Inter-State Motor Freight System and Parker Motor Freight and except to the proposed Report and Order in the above entitled proceeding in the following particulars:

1. The factual findings of the Examiner with respect to what is sought and the manner in which the operations will be conducted are generally entirely in error. Specification of the particular errors will be made in the discussion under this heading.

2. The finding by the Examiner that:

"Supplementing the evidence of applicant and railroad employees forty-two shipper witnesses representing various businesses at points located on the proposed routes testified as to the necessity for and the convenience of the considered services." (Sheet 3.)

3. The finding of the Examiner set forth on Sheet 4 that these witnesses testified that "Such service would be a decided convenience to them."

4. The statements by the Examiner on Sheets Two and Three that he gave consideration to another application by this applicant and that facts in that case were partially responsible for the determination of the issues in this case.

5. The Examiner's error in excluding the limitation heretofore imposed on the railroad by giving consideration to facts of record in other cases but upon which there was no showing in this case, as set forth on Sheet Three.

6. The finding of the Examiner that the protestants "take the position that the existing motor carriers in the considered territory should be afforded opportunity to improve their present service and facilities before authorization for new service is granted."

7. The finding and conclusion of the Examiner as set forth on Sheet 4 that:

"Upon consideration of all evidence of record, the Examiner concludes that the record amply warrants the granting of the authority sought subject to the conditions imposed by the Commission in Kans City Southern Transport Company, Inc., Common Carrier application, supra."

8. The Examiner's failure to give any weight whatsoever to the undisputed evidence that there are sufficient carriers already in the field presently furnishing the same sort of service to the Pere Marquette Railroad and who could also furnish such service to the Pennsylvania Railroad in this case.

9. The Examiner's finding in general that the proposed authority is warranted despite the fact that the record is without any supporting evidence whatsoever going to show that the public convenience and necessity actually requires the service. These protestants have been denied due process in many particulars.

10. The grant is based on a discriminatory application of the statute.

11. The many errors of the Joint Board in admitting and rejecting evidence noted and discussed in our brief were not mentioned and no factual findings were made on any of the many important points thus raised in the trial of the proceedings.

12. The failure of the proposed report to limit the authority to less truck load traffic.

## DISCUSSION

The matter now brought to the attention of the Commission in these exceptions deals with an application made by the Willett Company of Indiana, a subsidiary corporation of the Pennsylvania Railroad. Inasmuch as we filed a rather long brief bearing date of August 6th, together with a supplement dated August 19th, 1942, we will not burden these exceptions with a repetition of the things there set forth. In discussing the various points set out below we pray reference to that brief and its supplement and now specifically incorporate those documents in and make them a part of these exceptions for the purpose of conserving the time of the Commission and saving paper and expense.

Briefly, this is an instance in which the railroad is seeking to have its wholly owned subsidiary truck line inaugurate a new motor carrier service over routes already served by a number of motor carriers. In making its case the railroad has relied completely on its repeatedly announced statement that they need only show that it—the railroad—will benefit in order to justify the grant of authority to its subsidiary. It has taken the position that it need only present proof to show that the railroad claimed that some benefits would accrue to it. Our brief and the exceptions discussed herein will amplify and explain this proposition.

The protestants have presented uncontradicted proof that they could and would furnish the precise kind of service sought if the railroad desired them to do so. That they are presently furnishing that precise kind of service to another railroad. The arbitrary refusal of the railroad to entertain the protestants proposal is fully discussed in our brief. The case has been decided wholly on the basis of the Examiner's belief that the Commission has already determined the issue in other cases and that therefore he need not consider our proof. His position as explained in the report is that it is immaterial whether present carriers can furnish adequate service or not. It is the protestants position that where it is shown that the protestants can furnish the service the applicant cannot receive a certificate. We take the position that the mere fact that the railroad wants the service of its own offspring is of no moment if carriers already in the field are able to furnish the service. The applicant argues to the contrary and the Examiner has completely supported the applicant's position.

In these exceptions we are endeavoring to point out that the Commission is bound by law to accord the same treatment to a rail-owned truck line as it does to all other motor carriers. We take the position that even if a railroad shows there is need for truck service to handle its less truck load traffic, it is not entitled to have its wholly owned subsidiary projected into the field unless it can show that the carriers presently holding certificates are unable to furnish the service required. The applicant argues that this is not true and the Examiner has held with them. We take the position that the same test must apply here as in all other cases involving applications for certificates. We refuse to agree that a railroad need only show that it wants the service and that it will not do business with carriers able to furnish the service to justify the issuance of a new certificate. It is not enough to merely show a need and a refusal to deal with present carriers. There must be a showing that the public convenience and necessity requires the proposed service by someone plus a further showing that there is no carrier presently in the field capable

of furnishing it. The Examiner has held directly to the contrary, He states that he has based that finding squarely on the Kansas City Southern and related cases. We point out herein that our factual situation is wholly different from that in those cases but also make the point that the interpretation of the statute in those other cases is wholly fallacious. The exceptions and arguments that follow are directed towards these major propositions.

ANALYSIS OF PRIOR DECISIONS AND COMPARISON WITH PRESENT CASE

The examiner has indicated that the prior decisions of the Commission has completely governed his finding in this case. Indeed he has pointed out that it would serve no useful purpose to even discuss the facts or issues in this case because that had already been done by the Commission. It therefore will be helpful if we analyze the Kansas City Southern and related cases. We will undertake this from two standpoints. The first will be to so analyze the Kansas City Southern case as to show that the factual situation relied on by the Commission in reaching its decision in that case are not at all comparable with the facts in the present case. In other words, we shall undertake to distinguish the facts in that earlier decision from those in our own case. The Examiner unfortunately, has not done this but has proceeded to the conclusion that the earlier Commission decision governs all cases involving a railroad either directly or indirectly. He has indicated that it is hopeless to expect the Commission to reach any conclusion differing from that in the Kansas City Southern case regardless of what the factual situation may be. This is implicit in everything he has said in our order.

The second point we shall attempt to analyze and explore is the one we made throughout our brief. We shall contend that the decision in the Kansas City Southern case is a wholly fallacious one regardless of the factual situation and that it is contrary to law in every particular. We shall briefly analyze the reasoning of the Commission and endeavor to show that the Commission has jumped many cogs in its chain of reasoning and that it actually does not have anything of substance to support the conclusion it reached in that case.

At the outset we want to make it clear that while we differ greatly with the Commission and the Examiner in their conclusions, we appreciate the fact that both the Examiner and the Commission are motivated with a desire to reach a proper and fair disposition of the cases. We do not want anything we may say to be construed as anything other than a legal attack on the decisions of the Commission. Nothing we say is intended other-

wise and nothing we have said is set out here except as an expression of an earnest desire to get before the Commission as emphatically as we can the many reasons why we feel grave errors have been committed in the earlier Commission decisions and now threaten to determine the issue in this present case. We feel that the Examiner has pretty well expressed a feeling of helpless inability to reach any decision other than that set out in our order. We think his order quite clearly indicates that he feels that no matter what the facts may be and no matter what his personal convictions are, he is forced to grant the certificate because of the broad language used by the Commission in the earlier decision. It is because of these things that we therefore express ourselves in these exceptions as forcefully as we know how. Our duty to our client makes it imperative that we use every means at our disposal to call these things to the Commission's attention.

In reviewing the prior cases and in applying the law to the present case, the Commission should keep one question in mind. What proof can protestants present to defeat a railroad applicant? Is it possible to present any proof that will defeat a railroad applicant?

The only issue in any case involving an application for an extension or for new authority under the provisions of the Motor Carrier Act of 1935 is as to whether public convenience and necessity requires the proposed extension or new service. Every applicant in such a case must show two things if it is to justify the issuance of a common motor carrier certificate.

1. A genuine need by the shipping public for the service.

2. Absence of any such service or complete or partial inability on the part of existing carriers to furnish the required service.

In our case the applicant has not shown that any part of the public is even inconvenienced let alone suffering for want of any service. The applicant's own witnesses have agreed that their present rail and truck service adequately serves their needs. Since only four of their shipper witnesses were sworn and examined on the stand it is only necessary to refer to the testimony of those four witnesses. Stipulations covered the balance of the shipper witnesses they presented and the cross-examination as well as the direct was, by that stipulation, made the same as that of these four. We therefore shall refer briefly to the statements made by those four witnesses to illustrate the first point we made above. The first witness, Mr. Claude H. Caton, of LaGrange, Indiana, upon direct examination made a statement that is typical of all the rest. When interrogated by applicant's counsel as to whether the speeding up of rail service by the proposed method would serve the convenience and necessity of his particular business, he answered:

"A. It will help us, I think, yes, sir" (312).

Upon cross-examination he was asked a number of questions as to the rail service he is receiving from the several towns he named. He indicated that the present Pennsylvania Railroad service was satisfactory and then was asked the following question to sum up the entire situation:

"Q. In other words, then, with the service you are receiving at the present time both from the Pennsylvania Railroad as it is now operating and from the various trucking lines that are serving you I take it that your transportation needs are adequately served, are they not?

A. As best I know" (318).

A little later on cross-examination he was asked about his knowledge of motor carrier facilities serving his point. He indicated that he supposed there were a considerable number but admitted that he had not checked to see. He was then asked:

"Q. Was that because the type of service which you are receiving and have been receiving from the railroad was good enough to take care of your needs?

A. Yes, sir" (331–332).

The second witness, Mr. M. L. Button, of Plainwell, Michigan, took precisely the same position as the first witness. After indicating that he used truck service on all movements to Illinois, Indiana and Ohio, because that was a better service, he then went on to admit that he knew very little about how the rails handled any of his shipments and had no knowledge of their present schedules. His testimony was well summed up in the following question and answer:

"Has the rail service, when you use it to and from Fort Wayne, been satisfactory to you?

A. Well, as far as we know it has. Yes, sir, but of course, I cannot speak for our customers. In other words, they might make complaint to the railroad company and we would not know anything about it.

Q. I mean so far as you are concerned.

A. Yes" (387).

The witness made another statement or two and then the following ensued:

"Q. But generally speaking, you are satisfied?

A. Generally speaking I would say that we are satisfied with the service, yes, sir" (387).

The general attitude of this witness was pretty well shown by his flippant answer to one of our questions. We were endeavoring to explore his knowledge of both rail and truck schedules and

operating problems. After some considerable fencing with him he admitted that he did not have such knowledge and added:

"A. Life is too short" (389).

Their next witness, Mr. Edward F. Dinkel of Conklin, need not be discussed at any length because it developed that he was the pick-up and delivery man for the railroad at his town. He concealed this information from the first cross-examiner and did not admit it on direct. His obvious bias certainly should disqualify anything he says. He said that in one particular case involving a shipment from Milwaukee the railroad had given him slow service but admitted that the service generally was satisfactory (405).

The fourth witness (which was the last presented from the stand) was George M. McDowell of Reed City, Michigan. He frankly admitted that his present transportation facilities were adequate to meet his needs. He was asked the following question:

"Q. The transportation facilities which you have available from the Pennsylvania Railroad and all of the different truck lines that serve you are adequate to meet your needs, are they not?

A. Yes.

Q. (By Mr. Harry Yockey): What was the answer?

A. Yes" (419).

He was then questioned with respect to the motor carriers serving his community and admitted that they were giving him prompt, efficient service (420). He was then asked one of the most important questions in the whole proceeding. This question was:

"Q. Would it make any difference to you as to the identity of the truck line that gives you the service that they discussed with you?

A. As to which line it would be?

Q. Yes.

A. No" (421).

On the succeeding page this question was asked him:

"Q. Then the railroad has satisfactorily taken care of you at all times, has it?

A. Yes, sir" (422).

Since under the terms of the stipulation the cross-examination of these four witnesses with the exception of that dealing with the employee of the railroad, is to apply to all of the remaining witnesses presented by the applicant it becomes clear at the outset that there is not a shred of testimony in the record in any way supporting any claim that there is a genuine need by the shipping public for any new service whatsoever. This point will be discussed more at length later on.

The applicant disdained to even attempt a showing on the second point mentioned above. There was not a line of proof offered

to show inadequate service or facilities. Both the applicant and the railroad boasted that they had no knowledge of the present motor carrier service. Indeed they grew angry at our questions and said that they did not care about it and would not use such service even if it was better than that the applicant proposed. Perhaps one of the queerest statements or expressions of their position in that regard was made by Mr. Christie after some considerable cross-examination of that gentleman. At one point when we sought to find out the extent of any investigation he may have made into available motor carrier service he said:

"I have not made any investigation whatever of any motor carriers along any of these seven routes and I have no desire to and I do not intend to" (616).

To make certain that the railroad attitude was clearly set out we eventually asked Mr. Christie this question:

By Mr. CLARDY:

"Q. Witness, would you—or rather would the railroad company which you represent under any circumstances avail itself of the service of any common motor carrier operating over the routes in question or any part of them even though that service might be equal to or better than that which is proposed by the applicant in this proceeding?

A. No, sir" (627).

It should take no argument in face of such testimony to establish our point that the applicant and the railroad have not made any showing whatsoever as to the inability of existing carriers to furnish the service. In other words, the testimony presented by the applicant and its parent, the railroad, standing alone is sufficient to demolish any claim that the service already in the field is not sufficient to adequately handle the business. But we protestants were not satisfied with making a purely negative showing by this cross-examination. We went to great trouble to make a positive showing which we shall now discuss.

The protestants presented a number of witnesses from several of the motor carriers operating along the seven routes involved in this application. We shall refer to the testimony of only one or two of them because all of the testimony of all of the witnesses is exhaustively analyzed in our brief already on file with the Commission and which we now request be made a part of these exceptions. At one place the witness, G. H. Duncan of Associated Truck Lines testified concerning a very important fact. His company parallels the proposed operation from near the Michigan-Indiana State Line almost all the way to the northern end of the state including the side runs involved. He was asked if at the present

time his company was not carrying on the precise type of operation proposed in this application.

"Q. As a matter of fact, are you carrying it on—meaning by 'you' your company—at the present time?

"A. Yes, sir.

"Q. For whom?

"A. The Pere Marquette Railroad Company.

"Q. For how long a period of time has your company been doing that?

"A. Well, we started on May 25" (938).

This witness then testified that other carriers had entered into similar arrangements with the Pere Marquette Railroad involving other routes in the state of Michigan (938). A little later on the witness testified that if the Pennsylvania would sit down with them they would be very happy to arrange the precise kind of operation proposed by the applicant (980 to 983). In passing it should be noted that the witness testified at great length concerning the lack of business both in-bound and out-bound at the various small points the railroad contends it wants the applicant to serve. Testimony of this witness on that point is of great importance because it demonstrates that there is not enough business to justify the present truck operations over these routes let alone warrant the imposition of a new line in that field. We ask that the analysis of his testimony set out in our brief and commencing on page 61 be gone over carefully and that the transcript be checked to get the full import of what he has said. He further completely demolished all claims of any possible saving. The important thing to note is that when we had finished with this witness applicant's counsel did not cross-examine him. Everything he said, therefore, stands without contradiction.

The witness, Don McKay, representing the Inter-State Motor Freight System, described his operations and demonstrated that they parallel the proposed line from Fort Wayne practically the entire distance. Like witness Duncan, he also testified that commencing on May 25th this year, his company had started carrying on precisely the same type of operation as here proposed for the Pere Marquette Railroad (994). He went into much of the same matter covered by the witness Duncan and emphasized the fact that there is a surplus of motor carrier service along the line the applicant proposes to operate. After testifying about the nature of the operation they are carrying on for the Pere Marquett, he was then asked whether the proposal of the applicant differed in any way from the service his company is affording the Pere Marquette. His answer was:

"No, sir. I haven't heard anything that appeared to be different. It sounds about the same to me" (1006).

This witness then proceeded to say that if the Pennsylvania Railroad wanted them to furnish this same kind of service that they are now rendering the Pere Marquette, his company would be glad to do so (1007).

The witness, Harry Parker, operates a service north of Grand Rapids paralleling the lines the applicant proposed to serve in that section. This witness testified that he was in a position to furnish service and that he would do so if the railroad would request that the arrangement be made. He indicated that a number of other carriers operated in competition with him and testified that his company could and would furnish the type of service the railroad claims it desires. Several other operating witnesses were likewise sworn and all testified in general along those same lines. A great deal more could be said about the nature of our testimony, but since it is set forth at length in our brief, we merely pray reference to it now in order to conserve time and paper.

With the railroad and the applicant having testified as we have shown above, it should be clear by now that the record does not contain a single line of evidence that would support any contention that there is a need for the new proposed service. Neither is there a scintilla of evidence to support any claim that the present carriers cannot furnish that service. While the railroad insisted that it did not want to use anyone other than its own child in this operation all the reasons in the world cannot erase the fact that they have absolutely no knowledge about the character or even the existence of motor carrier service over the routes they seek for their child. All reasons why they do not want to use other service are of no importance until after they have placed themselves in a position to prove that present service is neither available nor adequate. The complete lack of knowledge they admitted and the stubborn unwillingness to acquire any such knowledge would make any claim about lack of suitable service entirely without foundation or merit. The admission by Mr. Christie, speaking for the railroad, that he did not have the slightest idea what effect the use of our service would have on the railroad is a further reason why nothing they say should be given any weight. This certainly demolishes any possible contention that use of our service would be harmful to them. Some argument during the course of the proceeding led us to finally ask Mr. Christie what effect, if any, the use of our lines would have upon the railroad or its business. It took quite a struggle to get him to answer directly because he pretended to not understand the question. (See particularly pages 616–618.) We finally phrased it this way:

"Q. Would it affect your business in any way, either cause you to lose or cause you to gain?

A. (No answer.)

Q. Or do you know?

A. No, sir; I don't know" (618).

Perhaps one of the things said by Mr. Christie ought to be brought to the Commission's attention again. We had heard some discussion by him about an alleged difference between railroad freight and freight handled by motor carriers as well as contentions about an alleged saving to the railroad. This question was then asked him on cross-examination:

"Q. You testified in that connection as to savings that might be effected by the rail-truck movement, meaning the Pennsylvania Railroad and the Willett Company, between certain points, and from certain points to certain points, and I will ask you now to state if that same saving could not be effected, or if approximately the same saving in time could not be effected by the Pennsylvania Railroad interlining and transferring its freight at the break point shown there, to other authorized common motor carriers operating over the same route as you are proposing to operate over here?

A. I don't know. The question is such that I don't want to answer it, or try to answer it, any other way than what I have. I don't know what we could do, because I haven't investigated into it" (557–559).

But that is not all this witness had to say on that subject. Having partially evaded answering the question by saying he didn't know about the service or hadn't made any investigation, one of protestants' counsel pursued the matter further. He phrased the question to include the condition that the protestants be in a position to furnish precisely the same sort of service here proposed as a foundation for asking him whether or not the railroad could not obtain precisely the same savings he had described in his earlier testimony.

"A. I say, assuming further that they will perform the service in the same manner that the Willett Company will, then it could be, yes.

Q. The same saving in time would be effected?

A. *It could be, yes*" (561).

But that is not all. Mr. Anderson finally asked this question:

By Mr. ANDERSON:

"Q. Mr. Christie, have you made any study at all with respect to what might be done, or what saving in time might be effected by interlining, as I said, or transferring freight under participating tariffs, with other authorized certificated common carriers?

A. None whatever; no, sir.
Q. All right.
A. We are not interested in that" (562).

With this factual background now before the Commission we turn to a short analysis of the factual situation in the Kansas City Southern case. When considering our discussion of the things the Commission found as the basis for its decision in that case we suggest that the foregoing analysis be again read.

KANSAS CITY SOUTHERN CASE

The facts in this case are so greatly different it is difficult to understand how anyone could even assume there is a similarity. In the first place the matter was before the Commission on either two or three applications. This included a grandfather application covering part of the route or routes sought and while the report is not quite clear it appears that either one or two new applications were before the Commission. While the report does not so state it implies that probably some of the operations were being carried on at the time of the hearing and when the order was written. At any rate the always appealing fact that there is a grandfather application in the background was present in that case and not in our own. Another substantial point of factual difference is that the proposal in that case calls for a complete substitution of truck service for the local or way freight service in at least three of the divisions. The Commission recites at one point:

"Applicants proposed method of operation contemplates complete substitution of motor vehicle service for rail local or way-freight service in the three divisions between Joplin and Texarkana and in the Beaumont Port Arthur Division. All local traffic between points in these Divisions would move entirely by motor vehicle" (10 MC 229.)

The ensuing discussion makes it clear that service on ltl freight to the intermediate points was to be handled entirely by motor vehicle. In our case, the local or way freight trains are to continue operation and if the shipping public desires, even the way cars themselves, will continue in service. In other words, in our case there will be a complete duplication of service and effort not present in the Kansas City Southern case.

In that case the railroad presented what appears to be a detailed statement of the inbound and outbound tonnage at each of the points to be served. Exhibit 5 in our case is singularly misleading and does not show the fact with respect to the individual points to and from which they claim they want to serve. The brief we filed should be read to discover what valiant effort we made to compel the railroad to disclose the very figures willingly

presented in the Kansas City case. We even tried to have the Commission issue a subpoena duces tecum during the interval between the two hearings but without success. There is in our case, no showing whatsoever therefore that there is actually any substantial tonnage to move to or from the various intermediate points. As the transcript shows and as our brief points out we presented testimony that was not even attacked going to show that the tonnage moving to and from these points is so small as to not warrant continuation of all of the present motor carrier service let alone the addition of a competing carrier.

In the Kansas City Southern case the applicant proposed placing a great number of schedules in operation. In our case, however, they propose to run one schedule each way daily to duplicate with the rail service presently available. At one point the service now is every other day by rail and while it would appear that it may be daily by truck the record will disclose that there is no assurance that this will be true. We forced them to admit that the schedule proposed in their Exhibit 4 was only tentative and might be changed completely. There is, therefore, this additional difference between these two cases.

A vitally important difference will be found in the nature of the shipping witnesses testimony in that case as compared to our own. As our analysis above has disclosed not a single witness presented by the applicant testified that the present rail service was inadequate. On the contrary they admitted that the present service was meeting their needs. In the Kansas City Southern case the Commission makes the statement that a number of the witnesses had "pointed out the inadequacy of the present rail service" (page 230). Apparently some of the service was presently being offered to the public because the Commission makes the following finding:

"Shippers at Shreveport described a greatly improved service from there to Lake Charles and intermediate points and urged the need for similar improvements in the service northbound. A representative of shippers at Texarkana pointed out the deficiency in the present rail service to and from that point" (page 230).

It should be apparent immediately that in the Kansas City Southern Case the shippers have given detailed testimony as to inadequacy of present rail service. In our case there is not a line of testimony to that effect by any witness for either side. Here, therefore, is a difference that surely should distinguish the two cases without further study. In the Kansas City Southern case, the Commission apparently had before it testimony of competent shippers going to show that the rail service was inadequate and detailing the nature of the faults they found with it. In our case, on the contrary, the shipper admitted on cross-examination that the present rail service they are receiving is meeting their needs and

that truck service was adequate also. Surely it will take no argument to establish our point that the two cases are wholly dissimilar on the first important point we discussed above—that is that there must first be established a genuine need for such service, by the shipping public.

The Commission also recites the fact that at some points along the various lines the existing motor carriers would have to serve the points as off-route points. That is not true in our case. In every instance, present motor carriers opposing this application operate over the precise highways involved in the applicant's request for authority. The Commission also finds that some of the points are entirely without motor carrier service. Neither of these things are true in our case. The essential differences therefore between the two are so great as to make them wholly dissimilar.

At another point, the Commission in the Kansas City Southern case, concludes that the carriers would find it difficult to adjust their schedules to meet the needs of coordination with the rail service without disturbing their service to other points (page 236). In our case the record is entirely uncontradicted that no such situation could or would exist. We established that our service would definitely be available to the railroad involved in this case precisely as it is presently being made available to the Pere Marquette Railroad. The applicant did not trouble to cross-examine our witnesses with respect to these things. The railroad witness admitted we could give them the same savings in time and money (561). That witness however said the railroad was not interested in what we protestants could do for them. The Commission must therefore agree that in our case there is an uncontradicted showing that the motor carriers protesting could perform the service required and coordinate with the rail service whatever that phrase may mean. As we have pointed out several of these protestants are furnishing this so-called rail-truck coordinated service to the Pere Marquette Railroad in the State of Michigan. These carriers testified without contradiction that the service they are performing for that railroad is precisely the same as that described by the railroad and the applicant in this case. It therefore follows that the imaginary obstacles discussed by the Commission in the Kansas City Southern case are not present in our case. It is certain that the record in our case supports a conclusion directly contrary to that set out in the Kansas City Southern case. When the Commission takes into account the fact that in our case we have demonstrated that independent motor carriers can and actually are coordinating with rails exactly as here proposed it certainly cannot conclude that the obstacles to such a plan as described in the Kansas City Southern case are present in our case.

In this connection on page 236 in the Kansas City Southern case, the Commission has found:

"Upon the evidence therefore we are persuaded that coordinated service through the voluntary cooperation of all or some of the protesting motor carriers is not here practicable."

In our case there is no evidence to justify such a conclusion. On the contrary, the evidence we presented makes it certain that the belief the Commission entertains in that case would not be justified in our case. Certainly absence of knowledge and interest by the railroad cannot be used as the basis for such a finding. Frankly, we believe that the fears conjured up by the Kansas City Southern and adopted by the Commission in that case were just as groundless there as they are in our case. But regardless of whether that is true or not it is certainly clear that here we have an instance in which the truth of the old adage that "the proof of the pudding is in the eating" is amply demonstrated.

At another point in its order the Commission pointed out that the testimony related almost entirely to movement of shipments where both rail and motor vehicle service was involved (239). In our case the applicants did not present any shipper testimony about any need for such a coordinated service. The shippers did not make any mention of such coordinated service and indicated without exception a complete lack of knowledge about how any of their shipments had been handled in the past or would be handled in the future if the application was granted. The railroad, however, testified that about one-half of one percent of the total tonnage moving would not be of a character having either a prior or subsequent rail movement. With that statement in the record the Examiner has proceeded to grant the applicant a right to transport freight of all sorts without any relation to any prior or subsequent rail movement. If one-half of one percent of the tonnage is to govern the kind of order granted and restriction imposed then what about the remaining ninety-nine and one-half percent?

The foregoing set out many of the differences in the factual situation between the two cases. It should not require further argument to establish our contention made in our original brief and throughout these exceptions that from a factual standpoint the Examiner was not justified in simply deciding that the doctrine in the Kansas City Southern case automatically disposed of this and all other rail sponsored applications. In substance, however, the Examiner's report is bottomed on nothing more nor less than such a belief. We want now to briefly point out another reason why we think the Kansas City Southern doctrine should not be applied to us or to any other similar situation. In the first place,

the opinion of the Commission apparently proceeds on the mistaken theory that a motor carrier not owned by a railroad is utterly incapable of furnishing motor carrier service of the type described. We wonder if the Commission understands what such a position really means? As the Examiner views it, the Kansas City Southern case has said in substance that no independent motor carrier can render service where a railroad is in the picture in any way. The applicant in our case has argued that that is what the case means and the Examiner has agreed. When the Commission (236) made the observation that

"In view of the close adjustment of schedules and interchange arrangements which good and dependable service would require as well as the contemplated joint use of stations and employees, we believe that the railway has sound ground for this contention." it is unconsciously, we believe, indicating a belief that under no circumstance could a motor carrier not owned by a railroad ever satisfactorily perform service for a railroad. It does not say this but the Examiner may be pardoned for believing this to be the meaning. Of course in our case we have demonstrated through our arrangements with the Pere Marquette that this is not a sound conclusion from a factual standpoint. The total absence of proof to support such a statement here precludes its application to our case. We believe that from a legal standpoint it is even less sound. Let us explain what we mean.

A railway is not the shipping public. Public convenience and necessity mentioned in the statutes has to do with the shipping public and not with the carrier. This statement by the Commission indicates a belief that where the carrier refuses to do the things that it indicates it will do with its own child, that alone justifies their conclusion that an independent motor carrier simply cannot perform satisfactorily. In other words the Commission has interpreted the statutes to mean that one can hoist one's self by his own boot strap if he is adroit enough in how he goes about it. It is for that reason that we have maintained throughout these proceedings that the Commission has entirely misconstrued the statutes and is making a discriminatory application of it. The Commission in the Kansas City Southern case does not refer to any testimony pointing out that it would be impossible to adjust schedules and to do the other things required. It merely refers to the fact that the railroad has made that contention and then upon no firmer ground than that proceeds to say that they are persuaded that independent motor carriers could not perform the service. This amounts therefore to saying that where the railroad as a carrier indicates that it simply will not work with an independent motor carrier that is sufficient to persuade the Commission that the independent carrier simply cannot do the job as

well as the rail owned subsidiary. This amounts to saying that the railroad is entitled to a certificate simply by arguing with the Commission about something upon which it is unable to present any proof. We have not read the transcript in that case but we believe we are justified in saying that the Commission did not have before it at any time any facts upon which the conclusion could be predicated. Certainly in our case, there is definitely no proof whatsoever going to show that the independent carriers cannot do the job just as well as the rail owned subsidiary. On the contrary the evidence discloses that we are actually performing the service. The applicant makes much of the fact that it is performing such service now and that this proves it can do so on this new line. On that basis we insist we have proved we can do so also. From a legal standpoint, however, it is just as unsound whether there is evidence present or not. It is unsound because it amounts to a finding that a carrier of a certain type is automatically entitled to an extension even though there is nothing else to justify it except a frank refusal to do business with those in the field. We ask now that the Commission re-read our discussion of the facts in our case. We especially request that reference we made to the testimony of the witness Christie on pages 557 to 562 of the transcript be studied. In this case the railroad witness admits we might be able to furnish the service but at the same time also admits he has never investigated the subject and does not intend doing so.

Since this is quite obviously the very keystone in the Commission's decision in the Kansas City Southern case and since it is expressly negatived in our case, it is inconceivable that the Commission will reach such a conclusion here. In the absence of evidence the Commission cannot make of finding that certain thing is true. Where the applicant has no knowledge on the subject and protestants produce uncontradicted proof that we can furnish the service it is the very worst kind of legal as well as equitable error to make such a finding. This is therefore one of our chief complaints. It demonstrates the error of trying to decide our case by simply referring to another case without making any effort to analyze our evidence and comparing it with that which the Commission found in that other case. Due process has certainly not been followed in disposing of our case as this demonstrates.

### ANALYSIS AND DISCUSSION OF LEGAL PHASES OF CASES

We have said repeatedly above that the decisions of the Commission in the Kansas City Southern and succeeding cases were contrary to the statute. Immediately above we have pointed out

the differences in the factual situations in those cases as compared to that in the present one. We turn now to another phase. It is our contention that the Commission has not been justified in its determinations in the other cases and that starting with the Kansas City Southern case its application of legal principle has steadily gone from bad to worse. The Kansas City Southern case marked a clear departure from all previous construction of the statutes. The succeeding cases have gone even farther. Apparently without completely realizing it the Commission has now reached a point in its interpretation of the statute that no advocate of motor carrier regulations even dreamed would be approached. The Examiner in our case has construed the prior decision of the Commission to mean that a rail owned motor carrier is entitled to a certificate despite uncontradicted proof that independent motor carriers can furnish adequate service. It is his position that no motor carrier opposition can ever defeat a railroad application. We shall now undertake to demonstrate the correctness of this analysis of his position.

Most of the discussion in the Kansas City Southern case had to do with the contentions made by the railroad. A great deal of it was background matter dealing with the railroad operations and the grandfather phases of the matter. We have endeavored to analyze the report of the Commission and to pick out from it those things which the Commission has found as claimed facts upon which it has concluded that the service of the rail owned subsidiary was required. We will spend no time in analyzing the testimony alleged to support the contentions that there was a genuine need for some sort of truck service to supplement the rail service.

We turn first to the Commission's recitals of the contentions made by the railroad. These contentions the Commission sets out are the arguments advanced by the railroad in support of its position that it must have its own subsidiary handle the traffic rather than make use of the facilities of carriers already in the field. These contentions are:

1. Some of the towns to be served would be off-route points.

2. The railroad contends that the proposed service will not be competitive.

3. They argue that their own operation would attain greater reliability.

4. That this is a new type of service not offered by any motor carrier now in the field.

5. No single truck operator serves all of the points.

6. The operation of some of the motor carrier protestants is based on service to points not on the railway and therefore such

protestants could not offer a complete or successful rail-truck coordination service.

7. The railway is unwilling to turn traffic over to its competitors

8. The applicant says that even if the Kansas City Southern was willing to set up joint rates other railroads would not do so and thus cooperation or coordination could not be achieved.

We turn now to an analysis of the conclusions of the Commission based upon its interpretation of the argument made by the railroad. These conclusions are:

1. That the so-called coordinated service is a new service.
2. That Congress contemplated coordination.
3. That the railway suggests that it could withdraw from less truck load service much easier in another manner.
4. That the railroad is convinced that no bona fide coordination or cooperation could be attained with any independent motor carrier.
5. That the Commission cannot compel the establishment of joint rates or through service.
6. That the protestants have not suggested any plan for coordination.
7. That the railway would have to make arrangements with several motor carriers.
8. That the carriers serve other points and would have difficulty therefore in adjusting their schedules so as to be able to furnish the proposed service.
9. That the Commission is convinced that the railway is correct in its argument that it must own the carrier furnishing the service.

After reciting the above the Commission then says that:

"Upon the evidence, therefore, we are persuaded that coordinated service through the voluntary cooperation of all or some of the protesting motor carriers is not here practicable and that the useful public service which the proposed new operation would serve cannot be served as well by existing lines or carriers" (236).

Which one of these statements has any direct bearing on whether or not the carriers now in the field can furnish the service? Which one of these is a statement of a fact as distinguished from conclusion or argument? Yet the several statements set above represent in the entirety the alleged facts found by the Commission as justification for its proposed grant of authority. They do not, in our opinion, justify or warrant anything. Let us discuss these so-called facts one at a time so that we may show the Commission just how far astray they have gone in attempting to justify the issuance of a new certificate.

The first alleged statement of fact is that this is a new service. This we deny. It is an ordinary motor carrier service precisely the same as that being rendered by motor carriers generally. The only thing claimed as a distinguishing factor is that it is being furnished to a railroad. We have not read the record in the Kansas City Southern case, but in our case we certainly clinched the fact that there is not a single different factor that could justify anything. It is not even new because one section of the routes sought are served by a motor carrier now. We even forced the railway witness to agree with us as our brief set out. But even if it is a new service it is obvious that this fact does not justify or warrant the issuance of a certificate if any carrier already in the field can furnish the service. This recital that it is a new service therefore has no meaning standing alone. We shall discuss it again in a moment.

The next statement that Congress contemplated the very thing granted by this certificate is, of course, not warranted by anything. When Congress speaks of coordination or cooperation between the various types of carriers, it certainly was not attempting to say that that furnished the ground for the grant of a new certificate to a railroad or anyone else. Indeed, the very purpose of this part of the act is the exact opposite. All that Congress was attempting to say in the policy section was that the Commission should prescribe rules and should do things necessary to encourage and promote cooperation between railroad and motor carriers. The grant of a new certificate can only defeat that purpose. The Commission has apparently misconstrued this section to mean that where a railroad will not cooperate that furnishes some basis for the grant of a new certificate for the railroad. If that is not what the Commission means when it makes the statement it does in the Kansas City Southern case, then the language it has used is confusing and without meaning. It is applying the language as though it read that new certificates should issue if one of two carriers would not cooperate. And issue it to the one refusing to do so if that carrier is a railroad and the agreeable one is a motor carrier.

When the Commission cites with approval the statement by the railroad that it could withdraw from less truckload service in some other fashion it is apparently signifying a willingness to let the railroad threaten it into granting a certificate. What if a carrier does feel that it can get out of a certain business in some other fashion? What has that to do with whether or not it should be granted the right to inaugurate a new truck service? Why the Commission cites this as one of its conclusions we do not know. At any rate, it certainly does not justify the issuance of a new certificate.

The worst part of its recital and conclusion is its statement that the railroad is convinced that there could be no bona fide co-operation between itself and independent motor carriers. There certainly cannot be when they refuse to do so. What on earth has that to do with whether or not the railroad should be allowed to invade a new field of operation? It amounts to saying that the Commission is approving the legal argument of the railroad although there are no facts upon which the conclusion can be founded. We have not read the transcript but we venture the assertion that there is not a single line of testimony anywhere in the record of that case that would justify the Commission's finding that as a matter of fact the truck companies would not make a bona fide effort to cooperate with the railroad. Indeed, the Commission in another part of its decision in that case has specifically found that the truck companies have indicated a complete willingness to cooperate. There is therefore absolutely no justification for the Commission's adoption of the railroad's contention. Of course, the Commission cannot make such a finding as a matter of fact unless there is something in the record to support its conclusion. If, as its finding indicates, there is no testimony in the record, then obviously the Commission's recital of this statement of apprehension by the railroad is not only unjustified but constitutes a grave infraction of the constitutional rights of the protesting carriers. Certainly in our case this contention cannot be applied. We have made every possible bona fide effort to cooperate and have demonstrated that we are successfully doing so with another railroad. This reason, therefore, should not have been advanced in the prior case and cannot be applied in our case.

The statement of the Commission that it cannot compel the establishment of joint rates or through service is wholly beside the mark. It is unfortunate that the Commission should see fit to make such a statement and then to use it as the basis for the grant of a new certificate. This indicates an apparent confession that it will make no effort to carry out the policy set out in the statute relative to cooperation. In the first place the Commission has earlier said that the statute prescribes the necessity for co-ordination and cooperation with the various modes of transportation. The Commission has used that very fact as one of the grounds on which it has persuaded itself that there should be the grant of the new certificate. It has mistakenly called the grant of a certificate such cooperation. Observe how these two statements contradict one another. More important, however, from our standpoint is the fact that the Commission has chosen to recite this legal inability to compel the railroad to do something as a reason why the railroad should be granted the authority it seeks. This is a clear case of the railroad successfully lifting

itself with it own boot straps. The Commission is saying, in effect, that if the railroad will not do what the statutes say should be done, then that and that alone is sufficient to warrant a grant of the right it seeks. The fact that the motor carriers are willing to do what the railroad refuses to do is not considered any reason why the protestants should defeat the applicant, apparently. This is a one-way street, it seems.

The next reason the Commission recites is that the railroads would have to make arrangements with more than one protesting motor carrier. What of it? The only question before the Commission is whether or not the service is available—not whether it is available by one or a dozen carriers. Seven separate operations are required in our case—ten in that one. If this reason is supported by anything of a factual nature in the record, then all that it indicates is that the service is there but that the railroad simply wants to deal with only itself. If this reason means anything, then a motor carrier should be entitled to an extension of its operation by having someone testify that while it has plenty of service available it wants to deal with only one carrier. Such nonsense has never prevailed and never will where an ordinary motor carrier is involved. This alleged statement of fact therefore is no ground for the grant of anything. Can a certificate covering all the highways in the country be obtained merely by showing that no single carrier can serve all the routes?

The next statement by the Commission to the effect that the carriers might have difficulties adjusting their schedules is undoubtedly not supported by anything in the record. At least the Commission cites no facts to support that conclusion. None could be cited in our case because the testimony shows to the contrary. (See our earlier discussion.) But it is our contention that this is a legal error on the part of the Commission because it is a finding not supported by fact and one which furnishes no justification for the grant of anything in the way of a new certificate under any circumstance. Until it is demonstrated by competent evidence that the existing carriers cannot furnish the service the Commission is not justified in making any finding of this sort. In our case there definitely is nothing to support it. On the contrary, as we have shown earlier, it is undisputed that we could do so and that the railroad has no knowledge on the subject.

On the basis of the above arguments or alleged facts the Commission then concludes that it believes the railroad is correct in its argument that it must own the truck line. Of course this last is a mere conclusion and is not intended to be a statement of fact. Since, however, it is supported by only those things we have just discussed plus one other argument it ought to be apparent that there is nothing substantial to support it. Perhaps, however, the Com-

mission is giving great weight to the contention that the protestants have not suggested a plan of co-operation or co-ordination. Here again, of course, this does not apply to our case but we want to make the point that it was legal error to have even mentioned it in the earlier decisions. We say this because it apparently means that the Commission has shifted the burden of proof from the applicant to the protestants. Since when has it been necessary for protestants to show that the railroad and the motor carriers would be able to operate under a certain sort of plan when the railroad is refusing to even entertain a proposition? Since when has the burden shifted to the protestants in any case to show something in the way of affirmative proof when the applicant has not made out a case?

As we understand the law, in all cases of this sort, the applicant is under the burden of showing that there is a public need for the service and that the carriers in the field are unable to furnish it. It is never necessary for the protestants to come forward with proof showing that their service is available and satisfactory until the other side has definitely established the contrary. There is not a line of evidence suggested by the Commission's decision in the Kansas City Southern case to the effect that the motor carriers were in no position to furnish the service. True, the Commission recites that the motor carriers serve other points and that several carriers would be required to furnish the service, but that is merely argument and is not a solid fact indicating that the carriers would not or could not furnish the service. We challenge the applicant in this case to point out a single solitary bit of evidence in the Kansas City Southern case that would support any of the conclusions that the protestants there could not have furnished the service. We submit that the only thing to support such a conclusion is the fact that the railroad simply will not do business with any of the protestants. This, we think, is the essence of the whole case and that for that reason it is fatally defective. We have gone over the report so many times we almost know it by heart. We are certain, therefore, that there is no recital of any factual basis for the decision except those things we have analyzed above. Not a single one of those things the Commission recites as justifying the order can be said to be a fact proving that the carriers already in the field could not furnish the service.

If the Commission's conclusions are studied and then compared with the recital of the railway contentions, it will be seen that all the Commission has done has been to recite with approval the arguments of the railroad. This is far different from a citation of factual matter upon which to base an order. A mere recital that the Commission believes that the carriers would have

difficulty arranging their schedules and that the Commission cannot compel the railway to get along with the truck companies are pretty thin statements to be used as support for the grant of the vast authority set out in the Kansas City Southern case. It, however, so far as we can see, constitutes all the Commission has been able to find in the record.

As an indication of how the Commission has indulged in faulty reasoning throughout we turn now to its statements on page 238 of the report in the Kansas City Southern case where it said:

"We do not believe that the development of this new form of service will seriously endanger the operations of protestants but in any event the public ought not to be deprived of the benefit of an improved service merely because it may divert some traffic from other carriers."

When the Commission said this it apparently had overlooked the fact that earlier in its discussion it had recited with approval the fact that the railroad had been apprehensive about losing business to the truck companies. The Commission has apparently decided that the rails apprehensions about losing business to motor carriers furnish one solid ground for the grant of new authority to the railroad yet in the very next breath says that the public ought not to be deprived of this service merely because of the same apprehensions of motor carriers. Inconsistency certainly runs throughout the order but this is the worst example of it. If rail apprehensions about what motor carriers would do to take away their business justifies the grant of authority, then surely motor carrier apprehension as to what the rail would be able to do in taking business from motor carriers ought at least to cancel out the first statement of belief or apprehension. It has not worked that way, however, in this case. Since no proof was presented on that issue in our case and since the railroad admitted it had no knowledge on this subject it surely cannot be found as a fact (618). Even more serious, however, is the fact that the Commission apparently recites this in the belief that that has something to do with whether or not the present service in the field can handle this business. It surely takes no argument, if one will but reflect for a moment, to establish our point that this recital has absolutely nothing to do with the real issue of convenience and necessity.

Right after the above statement was made the Commission said:

"If that principle had been followed indeed no motor carrier service could have been developed" (238).

This, of course, is the most fallacious argument possible. In the first place, motor carriers developed their service against the opposition of the railroads. Motor carriers pioneered a service that

the public has increasingly found adequate and efficient. The rails now seek to step in and oust these pioneers. The very proof of that fact lies in the contentions made by the railroad in this case. They frankly admit that it is a better and more efficient service. It did not develop with the help or aid of the railroad. Yet this statement by the Commission seems to imply that the motor carrier service in the field today would not have been offered to the public or come into being had it not been for the railroad. It seeks to imply that the ground just discussed above is justified because if they take any other position the motor carrier service would not have expanded to its present proportions. This, of course, is certainly contrary to all known facts and we confess we do not understand why this sort of thing was advanced as a support for the grant of authority.

If the Commission is trying to say that it is rejecting the protestants' arguments that they will lose business if the rail subsidiary is granted a certificate then again we must say it is basing a position that has no substance. This certificate is a motor carrier certificate of precisely the type granted to all applicants. The statute makes provision for no other kind. The physical manner of operation does not differ from that of ordinary truck operation as we demonstrated. But when the Commission says that the possible loss of business by protestants is no reason for denial of the grant it is putting the cart before the horse. The real question is a far different thing. Is the new carrier needed to adequately serve the public? That is all the Commission can consider. We can agree that if, upon the facts of record, the Commission finds that a new carrier should be permitted to have a certificate, it is, in some cases, of no moment whether other carriers lose business or not. But whether they will or not is no affirmative fact justifying the grant. It is merely a consequence that will flow from the grant. The citation of this argument seems to imply that the Commission believes it a strong argument. It is cited in even stronger language in later decisions. We must, therefore, point out its total inapplicability. In passing we should note that if the grant of a new certificate threatens to so weaken existing carriers as to endanger their ability to furnish adequate service, the Commission should not grant the authority.

Let us look at it another way. When considered with other things, the Commission has said in the order in that case, this language implies that the very fact that the railroad may take business from present motor carriers is actually an affirmative fact that justifies the grant and at the same time it is also agreeing with the railroad that because a motor carrier may take some railroad business if the grant is denied, that fact also justifies the

granting of a certificate. This is certainly playing both ends against the middle. We protestants may take business from the railroad, so it is claimed. That, in their opinion, warrants the grant of a certificate to the railroad to enable it to protect itself against the puny attacks of the motor carrier. But when the motor carrier points out that the railroad probably will take business from it—the motor carrier—if the certificate is granted, that also is advanced as a reason why the railroad should be granted the certificate. The Commission has adopted both arguments. Logic cannot justify such strange reasoning.

Now let us quickly trace the later development of the doctrine established in the Kansas City Southern case. We think we can demonstrate that bad as it was in the first case it has now deteriorated to a point where the Commission has clearly violated the statutes in every subsequent decision and that the Examiner has done so in our case. Even if we were to concede that the things we have analyzed above do furnish a factual background upon which the Commission's conclusion could have been based in the Kansas City Southern case we now propose to show that that doctrine has been changed and misapplied in a way that clearly violates both the statutes and the constitution.

Note carefully that in the Kansas City Southern case the Commission sums up its determination to grant the authority by saying that:

"Upon the evidence therefore we are persuaded that coordinated service * * *"

Note well the first three words "Upon the evidence." That indicates that the Commission at least believes that it had some evidence in the record to supoprt its conclusion that the protesting motor carriers could not furnish the service the railroad claimed it desired. While we have argued vigorously that the record as set out in the report does not warrant such a conclusion we now want to trace the development of this doctrine and show what has happened to it in subsequent cases.

In the Missouri Pacific case cited in Volume 22, Motor Carrier Cases, we find the Commission reciting that the protestants had presented proof going to show that they were in a position to furnish the service. The Commission on pages 330-331 briefly analyzes the evidence presented by the protestants going to show that they could furnish the service. Note well the disposition made of those contentions. The Commission says:

"Substantially similar contentions were advanced by certain protestants in Kansas City Southern case, supra, and our views with respect thereto are amply set forth therein" (331).

In the Kansas City Southern case the Commission was careful to say that after inspecting the evidence it was brought to the conclusion that the so-called voluntary co-operation was not practicable, whatever that means, and that other carriers could not furnish the service despite the contentions of the protestants. In the Missouri Pacific case, however, the Commission definitely recites facts going to show that the motor carriers could and would be in a position to furnish the service. They dismissed that showing however, by the short sentence we have cited just above. This amounts to a further advance along the line that we have been attacking since this present case was started. In the Kansas City Southern case the Commission apparently recognized that independent motor carrier service under some circumstances might conceivably meet the alleged need. For that reason it therefore predicated its finding "upon the evidence." In the Missouri Pacific case, however, the Commission contents itself by merely saying that contentions along this general line were made in the earlier case and that it is unnecessary to pay any attention to them. It utterly misconceived the basis of that decision. We turn now to yet another case.

In the case entitled Atlantic Coast Line Railroad Company Extension of Operations—Virginia—North Carolina, reported in Volume 30, Motor Carrier Cases, commencing at page 490, we find just about the last step that needs to be taken to completely wipe out any possibility of successful motor carrier opposition. After reciting something of the nature of the application and after saying that this is a new field of service, the Commission then says:

"Protestant asserts that Thurstone Motor Lines served all of the points involved, and it may be as contended, that existing motor carrier service is adequate, but one competitive carrier or class of carriers has no vested right in the continuation by another of an inefficient method of operation" (492).

On the next page the Commission then says:

"On the whole the facts and arguments presented are no different from those passed upon by the Commission in several instances granting similar authority to other carriers. See Kansas City Southern Transport Company, Inc., Com. Car. Application 28 MCC 5" (493).

See now how far the Commission has gone. In the first case it at least tried to say that the evidence in that particular case convinced it that the railroad's own subsidiary alone could furnish the service. In the Atlantic case the Commission has now said that even if the motor carriers could furnish adequate service the railroad should be granted the right nevertheless. It is one thing

to say that proof of inability of existing lines to furnish service warrants a new certificate but a totally different thing to say that all such applications should be granted regardless of the evidence. When the Commission concludes that "It may be, as contended, that existing motor carrier service is adequate" it was, in our judgment, completely destroying any possibility of lawfully granting any authority to the applicant in that case. It is utterly incongruous to say that existing motor carrier service is adequate and yet conclude that a new certificate should be granted to another carrier.

Especially dangerous is the statement that no carrier has a vested right in the continuation by another of an inefficient method of operation. Since when does an applicant acquire the right to inaugurate a new service on the sole ground that it, the applicant, is rendering poor service at the time. A moment's reflection will show that this statement by the Commission amounts to saying that the surest way to get new authority is to give poor service. Of course the whole subject should not have been considered and furnishes no basis for any conclusion other than that there must be a denial. The point we want to make however is that from the statement made in the Kansas City Southern case the Commission has slowly but steadily progressed to a point where it has said that even if motor carriers are able to furnish adequate, efficient service a railroad owned subsidiary is nevertheless entitled to a new certificate. By what strange logic can this be justified? It demonstrates what we have been contending all along that if these decisions stand as written and interpreted it means that no motor carrier in the United States can ever successfully oppose any railroad owned motor carrier on any application any time. In justification for that broad statement let us now look to the language used by the Examiner in our case.

On Sheet 4 the Examiner devotes a single paragraph to the proof we presented. As our subsequent analysis shows he omitted a discussion of much of the vital testimony and completely erred in interpreting much of the rest. Nevertheless he clearly finds that the protesting motor carriers are in a position to and could furnish the service. After that recital, however, he then says:

"Similar contentions on the part of protestants have been advanced in other like cases before the Commission. Especially in the Kansas City Southern case, supra, and what the Commission stated in that decision should apply equally well here."

What contentions? That we can furnish the service? That there is no need for a new carrier? Obviously that is all he has in mind because all he has said in summing up our evidence is to that effect. When he says "what the Commission stated in that decision should apply equally here," what does he mean?

It means that the Examiner, after finding evidence that shows that the protestants could and would furnish the service, has simply made up his mind that the Kansas City Southern case has established that no motor carrier protestant can ever defeat a rail application. He means that where the motor carrier efforts to furnish the service to a railroad have been summarily rejected by the railroad, as in our case, that fact of rejection is sufficient to justify the railroad's request for a certificate. The Commission has therefore traveled a long way toward establishing a doctrine that threatens the destruction of the motor carrier industry. Indeed it is well on its way to do so. If this doctrine stands it amounts to saying that the railroads are invited to file applications because they may be sure that the decision will be favorable regardless of any motor carrier opposition. This, we think, is probably not as apparent to the Commission as it should be. We, therefore, have gone to considerable trouble in this case because we think the time for a showdown has arrived.

Remember that the record here is uncontradicted that protestants are not only capable of furnishing the service but are actually doing so for another railroad. Remember also that the applicant did not present a single word of evidence to show any inability on the part of the protestants to furnish the service. The Examiner's statements, therefore, about prior cases can only mean that he has singled out as controlling, the Commission's language in the Kansas City Southern case where it has said in effect that it was persuaded that the railroad argument was sound when it said it did not believe it could obtain the service from any independent motor carrier. He has construed that to mean that in any case an independent motor carrier can never furnish the service whether they prove to the contrary or not. If this is not the meaning, then just what does he have in mind? We challenge the applicant to make anything else out of the decision. Since it has argued all along that the railroad need only show convenience to itself, it can hardly change its position now. But the hard inescapable facts make it impossible to refute what we have now pointed out. It is not only contrary to law, it is a bad policy. It reeks of discrimination.

One indication that Division 5 at least is now agreeing with us is found in its recent decision discussed more at length in our brief. In that case, the division after finding that there were protestants in a position to furnish the service, said this:

"Conceding this public need, the controlling question is whether or not there is already available a motor carrier, able and willing satisfactorily to supply such service for the railroad. If so, there is no need for applicant's added service in this respect."

We cited this case in our brief and pointed out the fact that the record in our case justified a similar conclusion. The Examiner apparently did not pay any attention to that decision of the Division and makes no mention of it. Instead he relies entirely on the Kansas City Southern case and its subsequent misapplication and misinterpretation. We do not believe that the Commission intended to say in the Kansas City Southern case that a railroad would be granted a certificate regardless of the evidence. The subsequent decisions however have broadened the doctrine to mean just that. This latest Division 5 decision brings the matter back into a more proper light. Nevertheless, until the Kansas City Southern doctrine is completely reviewed and discussed again it is unquestionably true that Examiners will continue to interpret it exactly as has been done in our case. It is for that reason, therefore, that we have urged these things so strenuously. It is for that reason that we also urge the necessity for an oral argument so that the points we make may be gone into with more thoroughness and so that the Commission and the Division may have an opportunity to get at first hand a better understanding of our position.

There are a great many other things that we could discuss with some profit in connection with the things set out in the Kansas City Southern case. We hope that what we have said will cause the Commission to again carefully scrutinize what it there said. Just one other point. We should mention that when the Commission says that it does not believe the grant of authority will endanger other carriers, it is unquestionably indulging in wishful thinking on a subject quite obviously not supported by anything in the record. If there are any facts the Commission is under the necessity of setting them forth before it states that unjustified conclusion. We can establish the contrary in our case but that, of course, is not necessary and we have not undertaken to argue that point at length here. We do not mean it is not important.

Reviewing some of our contentions that the Commission has made a series of legal errors we make several points. The Commission has not recited a single bit of evidence in the Kansas City Southern case that constitutes justification for any of the conclusions it reaches. It is therefore, in our judgment, defective and a violation of the statutes. More important is the fact that subsequent decisions have construed the Kansas City Southern case to mean that no motor carrier can successfully oppose a railway application even if the motor carrier service is completely adequate and satisfactory. This last interpretation of the Kansas City Southern case has been brutally applied in our case. It is for

that reason that we say that the Examiner's finding is in violation of the statutes and that our rights have been invaded without any justification whatever.

DISCUSSION OF OTHER PHASES OF CASE

Our brief, as we have said many times, sets forth a multitude of additional facts and reasons we have not had time or space to cover in these exceptions. We again pray that that document be incorporated in and made a part of these exceptions because the things there set out apply with equal force to the exceptions set out herein. We want to merely mention one or two of the additional facts and arguments discussed in the brief to illustrate what we mean.

The records show without dispute that the railroad proposes a duplicate service. It has in mind an operation of its trains over these several disjointed routes in exact duplication of the motor carrier service. It will not even concede that the way cars will be left off the local freight trains it intends to continue to operate. It has taken an attitude that indicate it is desirous of having both kinds of operation without any limitations of any effective sort. These are war times. Conservation of effort and elimination of duplication is now the order of the day. This railroad proposes to reverse the trend. Despite the existence of carriers who could furnish the service and despite the fact that the public is not objecting to the rail service it is now rendering it proposes to embark on a wholly new kind of operation. This to secure the right to engage in a keener sort of competition with motor carriers. There can be no justification for this duplication of effort. As the records show there was not enough traffic to and from the small towns the rail says it wants to serve to justify all of the present motor carrier service. The record shows without contradiction that it is necessary for motor carriers to divert traffic from one to the other in order to make it possible for the carriers to conform to present O. D. T. orders. Apparently, the railroad does not propose to pay any attention to those orders. In the present state of the record it is uncontradicted that the railroad cannot comply. It is possible therefore that the Commission will issue an order knowing full well that on the basis of this record it will require a violation of both the letter and the spirit of the O. D. T. orders. If this is granted the Commission is in effect saying that while independent motor carriers must be restricted and limited such does not apply to a railroad. Here again we have a bad example of discrimination.

If the joint board had not erroneously refused to permit us to be heard on testimony showing bias on the part of every single

one of applicant's shipper witnesses, the record would be replete with testimony showing that improper reasons and motives were behind the things said by the applicant's witnesses. This fatal error in our judgment must either result in a complete reversal of the Examiner's finding or the whole matter must be reopened and set down for further hearing. Of course with the war conditions as they are, it is our position that there should be no further certificates of this sort granted to any railroad. We press the point, however, that this fatal error by the Joint Board cannot be cured by the Commission merely rewriting the order granting a certificate. The substantial nature of the testimony we could have produced is evidence in part by the offer of proof we made. The Commission must bear in mind that had the Joint Board ruled properly and had the Examiner observed what we said in our brief the case would now be before the Commission without a single shred of competent shipper testimony presented by the railroad. The case would therefore stand before the Commission unsupported by anything except those things said by the applicant and its parent the railroad. This position of ours was fully explained in our brief but apparently no attention was paid to it.

We think one of the errors the Commission has committed in the line of cases we have discussed has been to accord great weight to anything said by the railroad and the applicant itself. It should be obvious that the railroad is the real party in interest in our case just as it was in the Kansas City Southern case. When the railroad therefore advances arguments about why it cannot and will not do business with other carriers, it simply is a self-serving declaration that should be given no probative value whatsoever. Yet in these past cases the Commission has gravely recited what the railroad contended and then proceeded to make a finding of fact as though there had been some evidence [illegible]nced to support those contentions. In our case the railr[illegible]m its presentation before the Joint Board and in its brief has contended vigorously for all of the things we are arguing against here. Yet it did not even bother to present any proof going to show that carriers presently in the field are unable to furnish the service. Will the Commission in the face of that failure make a solemn finding that the protesting motor carriers in our case could not adequately take care of the railroad needs? That is what the Commission did in the earlier cases and that is what the Examiner has done in our case.

If the railroad had produced some considerable proof to show that we could not furnish the service, then there might be a disputed question of fact that could be said to justify some sort of finding by the Commission. Where the rail[illegible]ad and the applicant

both admitted that they not only knew nothing about the protesting motor carrier's service but did not care to even investigate and indeed went so far as to say they would not do so, it is, of course, impossible for them to contend that we could not furnish the service. No one completely ignorant of the facts can ever state it as a conclusion that something can or cannot be done.

Our witnesses, however, were shown to be men with both railroad and truck experience. Some of our witnesses were able, therefore, to testify as experts with respect to the ability of the protesting motor carriers to adequately and completely satisfy the railroad. This they did. In addition, they pointed out that we are furnishing precisely the kind of service here required to another railroad in the same general area. Can it be then that the Commission will agree again with the railroad and say that it is impossible for the railroad to obtain the service without owning the carrier furnishing it? If it does so in this case under the record we made then, indeed, is all hope of successful opposition completely gone unless it is reversed in the courts.

The applicant's offer of proof as to why they did not want to use competing motor carriers is simply a statement of conclusions and reasons that deal only with the convenience of the railroad. It should be noted that not a single one of them has to do with any fact that would go to prove that the protesting motor carriers could not actually furnish the service. Of course, without any knowledge of our service they were embarrassed and could not even make an offer of proof on that subject. At any rate, it is uncontradicted in the record that the protestants could furnish the service but that the railroad without even troubling to find out about it, simply will have nothing to do with us.

## DISCUSSION OF NUMBERED EXCEPTIONS

We turn now to a brief discussion of the twelve general exceptions we made at the outset. Since all our prior argument deals with them, we will only briefly restate some of those things and advance some additional arguments and facts.

1. The Factual Findings Of the Examiner With Respect To What Is Sought and the Manner In Which the Operations Will Be Conducted Are Generally Entirely In Error.

On sheet two the Examiner makes the statement that "the service is confined to transportation which is auxiliary to and supplemental of the rail service." This is not correct, as a careful inspection of the record will disclose. We developed at great length the fact that much of the reason behind this application lies in the fact that the applicant wants to solicit truck busi-

generally and will move the freight from many points without any prior or subsequent rail service whatsoever. Their insistence on this point and the Examiner's refusal to impose the usual conditions should be noted. Our brief discusses it at length and we pray reference to that document.

In line with the statement just made, the attention of the Commission is invited to the following paragraph in the Examiner's report as set out on Sheet Two wherein he says that it is only proposed to transport freight "originating on the lines of the railroad or its connections." As the record will show this is not true and what they seek goes far beyond that. Again we pray reference to our brief for a full discussion on that point. The applicant refused to accept such limitation and the Examiner has agreed by refusing to impose that condition.

The Examiner's finding on Sheet Three to the effect that it is proposed to render a more frequent and faster service to the various points along the route is not justified by the record. While there may be a few points to which they have contended they will render a faster service, we challenge that finding. A more important thing to note, however, is the fact that they do not propose a more frequent service in any sense of the word and this finding is therefore clearly far beyond the record. Since it is obviously one of the determining factors in the case we specifically except to that point particularly.

The Examiner's blanket finding in the next to last paragraph on Sheet Three almost repeating verbatim the statement of the claims of the applicant with regard to savings without citing anything in the record to support it is a particularly bad error. The record will disclose that these claims were shattered and thoroughly discredited before the hearing was concluded. It is particularly harmful to us to have finding of this sort set out in the record without anything drawn from the transcript to support it. When reference is had to our brief and to the transcript, the force of this objection will be seen. We say flatly that these claimed savings are merely claims and that they did not advance any concrete evidence to support a single one of them.

The Examiner's finding on Sheet Two to the effect that all of the transportation will be moved under bills of lading issued by the railroad is one of the gravest errors in the entire report. As we pointed out in our brief the permission to the railroad and to this motor carrier to thus violate all of the rules of the Commission and plain provisions of the statutes is discrimination in its worst form. There is nothing whatsoever in the statute authorizing the Commission to make an exception in favor of a railroad yet that is advanced as one of the reasons why this authority should be granted. In other words, this report recites that the railroad and

the applicant propose to violate the statute and then that very fact is used as one of the prime reasons why this particular subsidiary of the railroad should be granted the authority rather than to permit the carriers already in the field to furnish the service. We again pray specific reference to our brief because we have discussed it more at length in that document. This is important and we stress it with all the vigor we possess.

We request that the Commission specifically find affirmatively all of those facts we contend for under this exception and those set out in our brief.

2. The Finding By the Examiner That "Supplementing the Evidence Of Applicant and Railroad Employees Forty-two Shipper Witnesses Representing Various Businesses At Points Located On the Proposed Routes Testified As To the Necessity For and the Convenience Of the Considered Services."

This finding is so far contrary to the record it is difficult to find words to express ourselves. Reference to the record will disclose that only four of the shipper witnesses were placed on the stand. It will show that not a single one of them testified at any point in any particular that there was any actual need for the service. On the contrary, each and every witness testified that the rail service they were presently receiving was adequately caring for their needs. We have discussed this so thoroughly and we have made the point so plain in our brief we cannot understand how anyone could read the record and then condense the substance to a single sentence of this kind. Public convenience and necessity as we have pointed out requires a showing on both convenience and necessity. The witnesses for the applicant merely testified that it would be to their convenience to have a faster service than that presently received. It cannot be said that they have thereby also said that there is a distinct need for the service. When these same witnesses admit that the present rail service does meet their needs we are unable to understand how anyone could make the statement we find here. When consideration is given to the further undisputed fact that all of their witnesses have admitted that it would make no difference to them whether the applicant or these protestants handle the business it is impossible to conclude that there has been any necessity of any sort shown by any of the testimony in this record. Since this will unquestionably be considered in any further steps taken in this matter, we earnestly ask the Commission to go over the testimony again and to give consideration to the argument we have made in our brief on this point. See also our citations and discussion earlier in these exceptions.

We request that the Commission find that the applicant did not present any shipper testimony showing any necessity for or any convenience to be served by the service proposed.

3. The Finding Of the Examiner Set Forth On Sheet 4 That These Witnesses Testified That "Such Service Would Be a Decided Convenience To Them."

This finding by the Examiner is simply a repetition of the statement he made at the bottom of Sheet Three and discussed immediately above. We challenge anyone to find any statement by any of their witnesses that the proposed service would be "a decided convenience to them." As we pointed out above, they all quite naturally said that any improvement in the service they were now receiving from the railroad would be acceptable to them. Not a one of them said it was necessary. More important, however, is the fact that none of them advanced any reason why the added convenience was of importance to them. Indeed, their testimony quite clearly shows that there is merely a willingness on their part to have the railroad improve the service by any means that it commands but at the same time agreeing that it is not important whether this is done or not.

We request that the Commission find that no one of applicant's witnesses has testified that there would be any decided or particular convenience to them. That instead, they all indicated present rail service is adequate and satisfactory and that there is no need for this additional service.

4. The Statements By the Examiner On Sheets Two and Three That He Gave Consideration To Another Application By This Applicant and That Facts In That Case Were Partially Responsible For the Determination Of the Issues In This Case.

The Examiner has gone far beyond the record and based his decision in the main on facts of record in a totally different case. None of that material is in this record and was not considered or discussed at any time during the course of the proceeding. Yet the Examiner at the bottom on Sheet Two and the top of Sheet Three has made it plain that he is basing his order on the belief that the Commission, having already considered certain facts in other cases and reached a decision, he need pay no attention to the facts in this case. He goes out of his way to point out that the operations are presumably the same and the conditions the same without in any way showing where the parallel lies. He then says that no discussion of the important element he is thus giving great weight to, need be even considered or discussed. This amounts to saying that the case was already decided before it was heard and that no useful purpose will be served by discussing it. We propose to make a point of this because we think it indicates that our apprehensions as expressed in the brief were warranted. The applicant throughout the proceeding indicated that he felt he had the case already won before it was tried on the basis of precisely what the Examiner has now said. This is

not fair and we submit that it is not in accordance with due process or the rules of the Commission. We ask that our brief be read carefully in connection with the entire case as it applies to this point. This has been a particularly grave exhibition of disregard of the record and we feel that the entire matter should be reopened and gone into thoroughly before any final disposition is made.

We request that a finding be made that the prior cases he has mentioned are not to be considered in disposing of this case because neither the factual situation nor the law in those cases have any application to this case.

5. The Examiner's Error In Excluding the Limitation Heretofore Imposed On the Railroad By Giving Consideration To Facts Of Record In Other Cases But Upon Which There Was No Showing In This Case, As Set Forth On Sheet Three.

In the second paragraph on Sheet Three, the Examiner points out that a certain condition which had been imposed in another case had subsequently been removed by the Commission. This condition has to do with the necessity that the shipment move on a through bill of lading and that it have a prior or subsequent move by rail. This error is much on the same order as that discussed immediately above. If anything, however, it is even worse. Here the Examiner has specifically stated that the Commission in another case in nowise connected with this proceeding has reached a certain conclusion. He has then proceeded to apply that conclusion to his findings here without any discussion or finding whatsoever as to how or why that is possible or permissible. He has said in substance that having considered facts in another case he will apply the findings in that case to the disposition of this one without in any way indicating at any time wherein there was any parallel between the factual situations of the two cases. Actually in our case we have demonstrated clearly that the situation is entirely unlike any other before the Commission. Our chief complaint on this point, therefore, is that in addition to deciding it on the basis of something that has been done in another case, the Examiner has fallen into the fatal error of saying in substance that it is not even necessary to review the facts in our case. He has brushed aside practically all of the evidence and reached a conclusion on the basis of evidence produced in a case in which the Commission has reached a certain conclusion and in which none of these protestants took any part. We think due process has been so abused in these findings that it should be apparent without further argument. There is no shipper evidence to support the finding and no proof was presented by the applicant itself.

We request a finding that the order, if it is to be granted, should contain a limitation restricting the applicant to transporting less than truck load merchandise having a prior or subsequent rail movement only and to and from the small intermediate towns only.

6. The Finding Of the Examiner That the Protestants "Take the Position That the Existing Motor Carriers In the Considered Territory Should Be Afforded Opportunity To Improve Their Present Service and Facilities Before Authorization For New Service Is Granted."

This finding has no support whatsoever in the statements made anywhere in the record by any of the protestants or their counsel. It completely misconceives our position and makes a fundamental error upon which the opinion and finding has apparently turned. Our position as protestants was that we are presently engaged in actually furnishing the precise kind of service proposed in this application. At no point is there any evidence that we are not doing so. There is not a line of proof that we want an opportunity to improve our service but on the contrary that we are presently rendering the precise type of service contemplated in this application.

The fundamental error made by the Examiner is the assumption that our present service would necessarily require some change in order that we might be in a position to furnish the service. The subsequent findings of fact as to our position do not square with this sentence but since he has made the statement set out above, it is obvious that he has jumped to the conclusion that we are not presently in a position to furnish whatever type of service is required. Of course it is sheer nonsense to take the position that the service here contemplated in anywise differs from the service ordinarily rendered by common motor carriers. The statement by the Examiner, however, is quite obviously a finding that there is a difference. Since this goes to the very heart of the case and since it is precisely in line with some rather loose language used by the Commission in other decisions, we challenge it specifically because it is obviously not supported by a single line of testimony.

This specific finding coupled with the failure of the Examiner to make a finding that we do have facilities for and presently are rendering the precise kind of service described by the applicant makes the whole finding doubly defective. It indicates that either the Examiner has failed to read the transcript and our brief or that he has for some reason we cannot fathom, deliberately chosen to omit the most vital part of our case from his finding and at the same time make another finding wholly contrary to the facts of record. Nothing can cure this error short of a complete recon-

sideration and a new hearing. It is so vitally important we insist that we are entitled to oral argument first and then another opportunity to go into the matter at length.

We request that a finding be made that the protestants take the position that they are in a position to and can furnish the service described by the applicant and the railroad.

7. The Finding and Conclusion Of the Examiner As Set Forth On Sheet 4 That "Upon Consideration Of All Evidence Of Record, the Examiner Concludes That the Record Amply Warrants the Granting Of the Authority Sought Subject To the Conditions Imposed By the Commission In Kansas City Southern Transport Company, Inc., Common Carrier Application, supra."

This finding or conclusion by the Examiner is, of course, the nubbin of the case. Immediately above this finding he has given the protestants the benefit of only a short paragraph of discussion of our evidence. He has not covered it with any particularity whatsoever and has omitted most of the important things we developed. We think the finding is fatally defective on that score alone. However that may be, it is important to note that the Examiner has plainly found that there are carriers already in the field capable of handling the movements and furnishing the service required. This, however, is waived aside again by simply saying that proof of this sort was presented in other cases and that whatever was done with those cases will be done here. This in substance amounts to saying that while it is clear that existing carriers can furnish the service the railroad is going to be permitted to have its subsidiary start a new operation regardless. We have gone into this thoroughly and completely in our brief. We submit that there is not the slightest support in the record for the Examiner's conclusion. On the contrary we submit that his precise finding, sketchy as it may be, concerning protestants' service is in itself sufficient to warrant a reversal of the finding.

Unless the finding is reversed then it can only be argued that the Commission is taking the stand that when a railroad is involved one measure of proof is to be used and that where an ordinary motor carrier seeks an extension another measure is to be adopted. Indeed applicant's counsel made such a claim during the hearing. This is discrimination of the worst kind and as we have pointed out in our brief, we cannot permit it to stand without challenge. The Motor Carrier Act becomes without meaning if it is only necessary for a railroad to come before the Commission with its child in hand and automatically receive a grant of authority even though the carriers already in the field are ready, willing and able to furnish the service. The last decisions of Division 5 on this point which we cited in our supplementary brief of August 19th are precisely in point with what we are saying. We

cannot understand how the Examiner has been able to reach this conclusion in face of the findings of the Division in these two last cases. We earnestly pray reference to our brief and the earlier argument in these exceptions for a more extended discussion of this point under this exception.

We request that a finding be made that upon consideration of all evidence of record the Commission concludes that there is no evidence warranting the grant of any of the authority requested and that the doctrine established in other cases is not applicable to the facts in this case.

8. The Examiner's Failure To Give Any Weight Whatsoever To the Undisputed Evidence That There Are Sufficient Carriers Already In the Field Presently Furnishing the Same Sort Of Service To the Pere Marquette Railroad and Who Could Also Furnish Such Service To the Pennsylvania Railroad In This Case.

This point quite naturally is an extension of the objections made in the immediately preceding subdivision. It is quite obvious that the Examiner has not only failed but has deliberately refused to give any weight whatsoever to the undisputed evidence produced by the protestants. He admits this when he says that such evidence in other cases did not prevent the issuance of a certificate. We have the benefit of only a short summary of our evidence set out by the Examiner. While he has devoted approximately three pages or more to summarizing the position taken by the applicant, the Order only accords us the benefit of one paragraph. However, that may be; the fact that he has agreed that we do have adequate service available indicates that he knows that to be the fact. When he immediately concludes that the new service is required by public convenience and necessity he is therefore admitting that this testimony is of no weight whatsoever in this case.

It is our position tht the Commission, in saying that a railroad or its subsidiary may be accorded the right to institute a new operation despite the existence of adequate transportation facilities, is interpreting the statute to mean that special privileges are to be accorded a railroad. With this, we violently disagree. Where as in this case it is admitted that the protestant carriers can furnish the service and where there has been no effort made to show that it would not be just as satisfactory as that proposed, any conclusion that public convenience and necessity requires the grant of authority can only be reached by ignoring all of the evidence given by the protestants. In other words, we might just as well have taken no part in the proceeding insofar as the Examiner's report is concerned.

The only thing that protestants can show in a case of this kind is that they are capable of furnishing this service and are ready and willing to do so. The Examiner has agreed that we made such

a showing. He has found this to be true. Any finding that public convenience and necessity requires the operation, therefore, simply has to be based on a complete disregard of all such proof. This is never done in any other type of case where a motor carrier is involved. We, therefore, make the point that the Examiner's proposed report and order violates the Statutes and does not accord us any consideration whatsoever.

We request that a finding be made that the protestants are not only presently engaged in furnishing precisely the same kind of service to the Pere Marquette Railroad but have shown without contradiction that they could do so for the Pennsylvania Railroad here as well as or better than the applicant.

9. The Examiner's Finding In General That the Proposed Authority Is Warranted Despite the Fact That the Record Is Without Any Supporting Evidence Whatsoever Going To Show That the Public Convenience and Necessity Actually Requires the Service. These Protestants Have Been Denied Due Process In Many Particulars.

In our brief we discussed at great length the fact that in this case these is absolutely no proof that the public or any part of it actually needs or requires the proposed service. As even the applicant will be forced to admit, the only thing to be found in the record to support any kind of an order is a claimed showing by the railroad that this may save them some operating time and possibly some expenses. While we disputed these points and, we think, proved this not to be true, it is not necessary to resort to any argument over disputed facts to conclude that there is no showing of public convenience and necessity.

We need only to look to the fact that all of their witnesses including the representatives of the railroad, talk entirely of convenience to the railroad. It is impossible for anyone to review the testimony of the four shipper witnesses they examined or the balance upon which we made a stipulation, without understanding that this record is completely barren of any proof going to show that anybody actually *needs* the proposed service. Again we pray that our brief be looked at carefully because we have gone into this at such length and have so paintakingly analyzed the evidence that we want to make sure that the Commission checks it carefully in passing on these exceptions. This case will undoubtedly not terminate quickly because we do not believe that the Kansas City Southern and other cases are at all in accord with the law. But whether they are sound or not is only a secondary point in this case. While we can see that the Examiner has decided the case on the basis of the doctrine established in those other cases, in our situation we have an entirely different set of facts. In those other cases there is claim to be some proof of a public need. Again

we repeat that in this case there is not a single line of testimony by anybody indicating any need whatsoever for the service. Indeed the testimony with respect to convenience of some of the shippers is too weak to be said to have established anything.

As we have pointed out elsewhere herein and in our brief, where it is clearly shown that there are carriers already in the field ready, willing and able to furnish the service and applicant may contend is needed, the Commission cannot lawfully authorize the entry of a new carrier into the field. Even if a service is needed it does not follow that a new carrier is required unless it is shown that those in the field cannot furnish the service. Apparently the Commission in other cases has taken the position that it makes no difference whether this service is already available or not so long as the railroad simply indicates that it will make no use of it whatsoever. That is the legal position taken by the railroad in this case and we had warning throughout the hearing that they were going to rely on that precise doctrine. They have succeded in convincing the Examiner that that is sound law. We challenge it because in every other case involving a motor carrier the Commission has always held that a showing that other carriers could furnish the service was, in and of itself, sufficient to defeat any applicant seeking a new certificate regardless of what else may be in the record. Applying that universally accepted doctrine to our case, we find that the Examiner has agreed with us that our service is available and would meet the need. Yet in face of that finding he then proceeds to the outrageous conclusion that, nevertheless, the applicant is entitled to the right. In plain English, had he chosen to speak frankly he would have said "So long as a railroad is involved it is not necessary to show the things that ordinary motor carriers would be required to show."

In our case, however, unlike in the other railroad cases, we were able to show that the protestants are actually furnishing the precise kind of service described, for another railroad operating in some of the same territory involved in this application. The Pere Marquette Railroad has entered into an agreement with a number of these protestants whereby they are required to furnish precisely the same kind of so-called co-ordinated station-to-station service contemplated in this application. Of course the order does not restrict the applicant to such but even if it did we could supply it. While we think the Commission was clearly wrong in the other cases in some of its conclusions, it should be obvious that under this set of facts the Commission cannot conclude that this is some strange kind of new service that the protestants are not now furnishing and therefore could not furnish to the railroad involved in this proceeding. Instead it is undisputed that we

not only can furnish such service but are actually doing so. In other words, the factual background purportedly set up in those other cases is not only lacking in this case but its very opposite is shown by proof that the applicant did not even trouble to challenge. Under such circumstances, therefore, the entire showing on public convenience and necessity, must resolve itself down to a mere claim that the railroad simply will not do business with anyone not owned by itself. In the last analysis this grant of authority must turn on just that and nothing more.

As we pointed out in our supplemental brief the Division had before it a case on all fours with this one, on another application by another subsidiary of the Pennsylvania Railroad. In that case, as we have pointed out, the Division reached the conclusion as the Statute obviously requires, that it could not authorize a grant of a new certificate where the record clearly shows that present carriers can furnish the precise kind of service required. See pages 1 to 5 of our August 19, 1942, brief. That particular case bears out everything we are saying here. The only difference in the two cases lies in the fact that in our case a goodly number of protestants are in a position to furnish the same kind of service and are actually doing so. In other words, in our case the record is many times stronger from the standpoint of the protestants.

If the Commission will trouble to look at the appendix to the Order it will be seen that this is not a simple case in which the applicant is asking for very little in the way of authority. The operations extend all the way from Fort Wayne on the south to Mackinaw City on the north with several side routes involved. The mere description of the route occupies three full pages of the appendix. This authority based upon the showing here made would never be granted to any ordinary common motor carrier without a showing of such prodigious strength as to be impossible in this area and in these days of war. Indeed because of the service already available we seriously doubt whether any regular motor carrier would ever be able to justify the grant of even a fraction of the rights here sought. Yet the Examiner has tossed off the protestants' showing of adequate service without giving it any consideration whatsoever other than to mention the fact that we had made such a showing. If such a finding had been set forth in an Order involving any other class of applicant the conclusion would have unmistakably been a denial. If the Commission can find any case in its files where there has been a finding that the present service already in the field could handle the business and yet has granted the authority, it has not yet come to the attention of these protestants.

Let us now pause and take stock of the situation on the issue of public convenience and necessity. The applicant has presented

railroad witnesses who have testified that some advantage will accrue to the railroad. Those claims were exploded by our own proof. They then presented four shipper witnesses who testified from the stand and 38 on whom stipulations were made. Every one of them has testified that their present railroad service is meeting their needs but have concluded that they would be convenienced by any improvement in that service. They did not complain, however, about the present service. They have admitted that the motor carriers serving them are furnishing this service and no complaints can be found anywhere in the record concerning the service of any of the motor carriers already in the field. That constitutes the entire showing by the applicant. On the other hand the protestants have shown they are ready, willing and able to furnish the precise kind of service here involved. Indeed they have shown they are presently rendering the precise type of service to the Pere Marquette Railroad in the same general territory. One of the routes sought is being served in part by a motor carrier operating for the Pennsylvania Railroad. They have shown that the Railroad has been approached by these carriers but that all their efforts to obtain the business have been rebuffed without a discussion.

The Railroads in their testimony arrogantly took the position that it was not only not necessary for them to discuss this with any existing motor carrier but that they would not do so under any circumstance. Indeed they said they would not use the service of other motor carriers even if it should be superior to that they proposed through the use of this applicant. Of the greatest importance is the railroad boast that they knew nothing of present motor carrier service and did not intend making any investigation into it. Their witness not only said he did not know about our service and had not investigated it but went further and said "we are not interested in that" (562). He was forced to admit that one of the protestants could furnish the service (559–561). These statements coupled with the statement that the railroad would not use the protestants even if their service was superior to that proposed (627) ought to be enough to convince anyone that there is no foundation for any claim that this proposed operation must be handled by a new carrier. Summed up, therefore, we have confronting us an undisputed set of facts that even the Examiner was compelled to admit showed the existence of adequate service amply able to take care of all of the needs involved. With an application of this size is it possible that the applicant expects the Commission to simply say that there is some mysterious unspoken reason governing them in cases of this kind that compels them to bow to the will of the Pennsylvania Railroad? We are sure that

when the Commission sees the record and analyzes it as we have done it will reverse the Examiner and deny the application.

We request that a finding be made that the application should be denied in its entirety because the applicant has failed to prove any of the necessary elements of public convenience and necessity. That protestants are in a position to and could furnish the service requested. That in the face of such uncontradicted evidence the Commission cannot authorize an additional carrier in the field. That any finding other than a denial would be discriminatory and would be contrary to the statute and a denial of due process of law.

10. The Grant Is Based On a Discriminatory Application Of the Statute.

The discussion under the above subhead and that set out in our brief is enough to establish the point we now seek to make. If the Commission in the face of the record made in this case, is going to say that a railroad is entitled to this authority even though there is adequate service available then it obviously is applying the statute in a way that discriminates against these carriers. It cannot say the statute means one thing when a motor carrier is before it and another thing when a railroad is somewhere in the background. Yet in our sober judgment the Kansas City Southern and some of the other cases have by indirection said precisely that thing. We do not believe the Commission has quite realized what it has seemingly said or has given consideration to the fact that its decision in those cases amounts to completely denying motor carrier operators all opportunity to oppose the grant of any authority sought by a railroad or its subsidiary.

Let us explain what we mean. No protestant can oppose the grant of a new certificate on any substantial ground other than that the protestant is able to furnish the service being sought. If there is any other ground except an attack on the financial ability of the applicant it has not been called to our attention. At any rate, that is the only thing the Commission can weigh as we interpret the statute. In this class of cases however, the Commission has completely denied to motor carriers any such right of opposition. While the language in the other cases referred to by the Examiner, does not say so in bald terms, the meaning is that any protestant motor carrier might as well save his time and money if a railroad seeks a new certificate. This is true in our case because we have met the burden of showing the existence of adequate service and the Examiner has found that it does exist yet on that foundation has concluded that the railroad should be granted the right its subsidiary seeks. This we contend, is a denial to us of our rights under the statutes and amounts to the discriminatory application

of the law. The Commission probably has not noted that its Kansas City Southern and other decisions have said just what we have indicated, yet if it will trouble to inquire among all of the motor carriers in the United States who have any knowledge whatsoever of those cases it will find that without exception, those carriers are of the opinion that those decisions by the Commission are saying by indirection precisely what we have indicated above. We challenge the applicant in this case to discuss this point directly and point out wherein those decisions say anything else. We would note with interest, any indication by the applicant that there is any possible way that a motor carrier protestant could defeat the request for a certificate by a railroad or its subsidiary under the doctrine described in those other cases and now completely adopted in ours. We know the applicant will not challenge this because it arrogantly asserted this to be the fact throughout the case. We think this should be thoroughly tested but we earnestly ask the Commission to reconsider what we think an unsound position and announce the correct doctrine in this case. While, of course, we are sure that our factual situation is different and that the Commission can upset the Examiner's report without directly reversing those other cases, we think that it should do so if for no other reason than to announce a more sound interpretation of the statutes.

We request that there be a finding that the same measure of proof applies to applicants owned by railroads as to all others and that the same showing of a lack of present adequate service is equally required in this type of cases. That the Commission is not of the opinion that a rail owned applicant can obtain a certificate without making precisely the same sort of showing required of all other applicants.

11. The Many Errors Of the Joint Board In Admitting and Rejecting Evidence Noted and Discussed In Our Brief Were Not Mentioned and No Factual Findings Were Made On Any Of the Many Important Points Thus Raised In the Trial Of the Proceedings.

We made a great many objections to the admission of evidence. When we sought to present other material evidence the Joint Board ruled against us. We pray reference to the transcript and to our brief for particulars. To conserve time and space we now incorporate all of those objections to the receipt of evidence in these exceptions and make them a part hereof. We shall not discuss at length all of those set out in the record and in our brief but we do ask the Commission to take particular note of the two following outstanding examples. We press all of our objections, however, and discuss the following only as examples.

As we have noted in our brief at the last hearing in the cause, we sought to present evidence going to show that each and every witness produced by the applicant had been induced to testify by something other than a desire to advance the cause of justice. We had a number of questions to ask our witnesses going to show that during the interval between the hearing the witnesses for the applicant had admitted that they had been present at the initial hearing for reasons that had to do with something other than a need or desire for service. Such testimony was competent and would have served to completely demolish every line of testimony given by the shipper witnesses presented by the applicant. The denial of our right to show the bias on the part of the witnesses for the applicant is fatal and we now ask that the entire order be set aside and proper proceedings taken to reopen the matter for this cause alone. The Examiner did not discuss this or any of the many other errors on the part of the Joint Board and this also is fatal error because there is no finding with respect to the objections we stressed in our brief. We made a number of efforts to induce the Joint Board to permit us to go forward with this line of testimony and even made an offer of proof but could not get before the Joint Board or the Commission all of the proof we had in that regard. This is because the Joint Board announced that we could not put on other witnesses dealing with the same subject. We therefore, in deference to the ruling, desisted from further efforts along that line.

Over our objection the applicant was permitted to present a great deal of evidence dealing with claimed advantages to the railroad. We insist that this was fatal error because it is clearly not competent for an applicant to thus hoist himself by his own boot straps. The applicant is owned by the railroad. The testimony that the parent will benefit by the actions of the child if the authority is granted is clearly not competent evidence to prove anything. Yet the whole order hangs on that testimony. We vigorously sought to exclude it but without success. We shall not labor at greater length to discuss all of the many other errors of this sort but we want to point out that these two in particular have violated due process in the most flagrant example of favoring a railroad that has come to our attention. We ask therefore, that the findings of the Examiner be set aside and the entire matter reopened if our concluding prayer is not first granted.

We request that a finding be made to the effect that the Joint Board made numerous errors in both rejecting and admitting evidence. That it committed reversible error when it refused to permit protestants to show that all of the railroad's shipper witnesses were biased and prejudiced. That the receipt of evidence

going to show some advantage accruing to the railroad was erroneously admitted. That the errors claimed by protestants warrant a reversal of the Examiner's report.

12. The Failure Of the Proposed Report To Limit the Authority To Less Truck Load Traffic.

The record is undisputed on the point that the applicant was seeking only the right to handle less truck load traffic. This was emphasized throughout the proceeding. At the very outset the witness Christie explained carefully that only less car load freight was involved. See page 37. The whole case was based on that contention. It is, therefore, rather astonishing to find the Examiner failing to recommend that any authority granted be restricted to such traffic. The statement by the various representatives of the railroad and the applicant as well as their counsel amounted to an amendment of the application. Many of these statements were made because we were insisting that they were seeking authority to handle both kinds of traffic. The statements they made were directed toward lessening the opposition by minimizing the importance of what they sought. It is, therefore, beyond dispute they were seeking only the right to transport less truck load traffic to the small intermediate points if we are to believe what they claimed. Since this furnished the main basis for the request for authority it surely will not now be disregarded.

We do not, of course, admit that they are entitled to any authority whatsoever. We point out this error because we think it evidences a state of mind that has prevented due consideration being given any of the points we have raised. We submit that this error is in line with the general contentions we made throughout our brief. While the order contains some language that sounds as though the applicant could not transport freight which originated off the rail line or which was not to have a subsequent rail movement, it is significant that the language normally used was omitted exactly as the applicant requested. The direct language that could have accomplished that purpose was omitted and instead some use of the word "auxiliary" was made. When the Examiner says that the service "shall be limited to service which is auxiliary to or supplemental of rail service" he is using what we can only term weasel words. The restriction means exactly nothing and permits the applicant to perform any kind of truck service it desires. We cite this fact because it is part and parcel of the whole theory on which the case has been handled and disposed of.

We request that the Commission find that if any order is to be authorized it must be limited to transporting less truck load traffic. That all movements be restricted to the small intermediate towns only and conditioned upon a prior or subsequent rail movement.

That, however, there has been no proof submitted warranting the grant of anything.

GENERAL DISCUSSION

This case presents an issue that should be determined on its merits without reference to any prior decision of the Commission. We dislike attacking findings made by the Commission in other cases under different sets of facts, yet since this case has not been given dispassionate consideration without reference to those other cases it becomes necessary for us to review the whole line of cases including the Kansas City Southern case to point out to the Commission the fundamental errors it has committed in allowing itself to be misled into its present position.

Briefly stated, the facts in our case are that the railroad has had its subsidiary seek a large number of extensions after refusing to have any dealings whatsoever with any of the motor carriers amply equipped and ready to furnish the kind of service the railroad claims it wants. In presenting its case, its proof has been relatively short and simple. We summarize that here in numbered paragraphs condensed to give the Commission the only important elements they have proved.

1. The Pennsylvania Railroad desires to transfer some less truckload merchandise to trucks for movement to points intermediate between two main so-called key points.

2. In obtaining this service the railroad is unwilling to enter into any arrangement with any carrier already in the field even if that carrier's service is superior to that it proposes.

3. The railroad will continue to handle its merchandise in a local freight train over the same route and merely proposes to leave off the so-called local car unless some of the customers insist on having rail service. In other words, they propose a duplication of effort.

4. The shippers along the road admit that the present rail service adequately meets their needs and had no complaint to make about the character of the service they are receiving.

5. No witness for the railroad testified that there is any need for the service but agreed that it would be convenient if the rail service should be speeded up. No reason or fact was presented in support of those conclusions.

6. The railroad witnesses testified that under their theory the service would be speeded up to some points but not to others and gave no indication as to what the overall picture actually would be.

7. The railroad did not have figures as to the tonnage available for movement and refused to produce it. The Commission

refused us a subpoena duces tecum and we were thus unable to get before the Commission any facts as to the precise tonnage that would be involved.

8. The protestants showed, without any attack being made on its claims, that the railroad would experience the same difficulties experienced by any other truck line and that the claimed savings of time could not possibly be achieved.

9. The protestants showed that their service is presently being offered to the railroad without success. That the Pere Marquette Railroad, however, has entered into agreement with several of the protestants and that the precise kind of service involved in this proceeding is being rendered in the same general territory for another railroad willing to enter into such an arrangement.

10. It was shown that the tonnage to and from the small points involved is not sufficient to justify the present available motor carrier service and that the entry of another carrier would further complicate the situation.

The foregoing paragraphs set out in substance the main elements in the record. It will be seen that there is not a line of testimony anywhere in the record going to show that there is any actual public need for the additional service proposed whether furnished by the applicant or anyone else. Not a single shipper witness presented by the railroad even hinted at any need, much less explain how that need arose. As it stands therefore, it is uncontradicted that the applicant has not shown any necessity whatsoever. On the other hand their own witnesses have admitted that the present available service by the railroad is adequately and satisfactorily serving them. On that foundation of sand, the Examiner has then based the conclusion that public convenience and necessity demands the additional service.

The showing made by the protestants was not even challenged by the applicant. It is uncontradicted therefore, that the protestants not only are ready and willing to furnish the service but that they are actually doing so for another railroad. In addition it was shown that a small motor carrier is furnishing part of the service presently but that he will be ousted in the event this is granted. There is absolutely no explanation given why this would be done and no complaint entered about his service. Because he is not owned by the railroad however his throat is to be unceremoniously cut when and if this order becomes effective.

We have gone into more detail in our brief to which we have repeatedly prayed reference. The foregoing, however, will highlight the situation and has been set out as a prelude to what we are now about to discuss. It is the position of these protestants that the Commission has no statutory authority to grant any

new certificate to any carrier unless there has been an adequate showing that public convenience and necessity both require the new grant of authority. We take the position that where it is shown that other carriers can and will furnish the service the Commission cannot justify the grant of a new certificate under any circumstance. It is our position that in situations like that involved in the Kansas City Southern case, the Commission has committed a grave error and has in effect deprived protesting motor carriers of the right granted them under the statute.

Let us speak plainly so that our meaning may not be mistaken. In the present case, the applicant has justified its request for authority by merely showing that it is willing to do business with a railroad which refuses point blank to have any dealings with any carrier not owned by itself. This is true even though the protestants have been shown to be able to furnish a service equal or superior to that proposed. We contend that under that set of facts, the Commission cannot possibly justify the present grant of authority. We take the position that there is not only nothing in the record in this case, but there has been nothing in the reasoning used by the Commission in the other cases to justify its conclusion that the railroad or its subsidiary should be granted a new right.

If we read the other cases correctly, the Commission has attempted to say that there is something different in the service proposed when the traffic moves by rail to a certain point and thereafter goes to destination by truck. (Here the service sought and granted is not so limited.) This we challenge and believe that there is no justification for such a finding in any of the prior cases. Whether that is correct or not, however, it is certainly true that in our case there is no factual foundation for any such conclusion. However that may be, even if there was some justification for such a conclusion, we have shown without challenge that these protestants are furnishing the kind of service proposed and could do so for this railroad. That reduces the case therefore to a very simple situation. It means that in order that this may be justified it is necessary to conclude that no protestant or group of protestants can ever defeat a request for authority by a railroad and its subsidiary under any circumstance. Let us explain what we mean.

It goes without saying that under ordinary circumstances where carriers not owned by railroads are involved a certificate will not be granted if the facts in the case warrant a conclusion that the carriers already in the field are ready, willing and able to furnish the service. If that is not the substance of every other decision by the Commission where motor carriers not subsidiaries of railroads are involved then we cannot understand the Commis-

sion's decisions. Assuming that that is the situation it will be seen that in this and similar cases the Commission, despite all the round-about language it has used, has in effect said simply this: "Where a railroad refuses to deal with carriers able to furnish the service, that fact alone justifies the grant of the new certificate." If there is any other basis for the grant in this case, then we would like very much to have it brought to our attention. We believe that the Commission in reviewing the facts in the other cases has been brought to its strange conclusions on some theory that apparently has not been stated very clearly. We have analyzed all of the cases carefully in an effort to find something in them that would justify the grant. We candidly confess that all we can find is the general conclusion by the Commission that this so-called coordinated rail-truck service (whatever that may be) is some new and strange kind of service that has never been performed by any motor carrier presently in the field. From that erroneous conclusion they then jump to the final conclusion that that fact alone justifies the grant of a new certificate. They have completely overlooked the fact that in so doing they are disregarding all rules of law or logic. The Examiner in our case betrays the fact that that is what the Commission is trying to say when he inadvertently made the finding that we protestants were taking the position that we should be given an opportunity to improve our service before a new certificate is granted. This conclusion by the Examiner is not justified in our case and we believe we can safely say it is not justified in any of the other cases. But even if it is justified it certainly furnishes no excuse for granting a new certificate. It would not be used as the basis for a certificate where an independent motor carrier is involved and it never has been. It is for that reason that we claim that the Commission has made a discriminatory interpretation of the statute and has applied it in a manner not warranted by anything found in the statute or the constitution.

We have said above that if the Commission's interpretation stands, no motor carrier could ever successfully oppose an application by a railroad or its subsidiary. We mean precisely what we say. As we have tried to argue in our brief and elsewhere in these exceptions a protestant can only oppose the grant of a new certificate by showing that it is ready, willing, and able to furnish the service. When that showing is completely ignored and the Commission specifically finds that that makes no difference, then our hope of preventing the railroads from duplicating every mile of trackage throughout the United States is gone forever.

In one of the recent cases decided by Division 5, the Commission said in substance what we have been arguing in our brief

and in these exceptions. In that case the Division had this to say:

"Conceding this public need, the controlling question is whether or not there is already available a motor carrier ready, able, and willing satisfactorily to supply such service for the railroad. If so, there is no need for applicant's added service in this respect." (Sheet 2.)

That doctrine is sound and is precisely in line with the findings found in many of the cases involving motor carriers not connected with a railroad. It indicates to us that the Division on inspecting a record where it is clear that the protestants can furnish the service is not blindly following the doctrine announced in the Kansas City Southern case and concluding that the order should be affirmative merely because a railroad is involved. In another case considered at almost the same time by the Division, the same general conclusion was reached with an additional finding that is extremely important. We refer now to the case entitled Railway Express Agency, Inc., Extension-Jackson-Saginaw, MC 6656 Sub. No. 380. In that case, the Commission points out that where the railroad could obtain the service by the use of some of the presently operating passenger trains, that should be done. That the difficulty in using that service to handle express did not justify the grant of a new certificate. These two cases together go far to establish the soundness of the arguments we have been making. They certainly establish the point that where it is undisputed that the protestants are ready, willing, and able to furnish the service, there can be no justification for a grant of a new certificate merely because a railroad wants it. We assert again that if this order is permitted to stand it can only be justified by the assertion that a railroad wants a certificate and that that fact alone is sufficient to justify its issuance.

In asking for oral argument we want to discuss not only the points raised in these exceptions specifically but the many other errors by the Joint Board and Examiner in admitting and rejecting evidence. We want also to be in a position to point out to the Commission the fallacy of many of its conclusions in these other cases which the Examiner has held to be controlling. Some of the language used by the Commission seems to us to be seriously prejudicial to all motor carriers and we think it is time that these things were bluntly called to the Commission's attention. There can be no doubt about the fact that the effect of the prior findings plus the one in this case is going to be to permit the railroads to obtain unlimited motor carrier operating authority in open competition with other motor carriers without any showing whatsoever as required of other motor carriers. At an oral argument, it will be possible to point out some of these things in better

fashion and for the Commission to interrogate us with respect to the contention that we and others have been making. We believe the Commission intends to enforce the statute fairly and equitably but we must assert with all the vigor we possess that it definitely has not done so in this particular case. If the Examiner is to be sustained, then the injustice perpetrated in the other cases will be more firmly entrenched than ever. For that reason, we endeavored to make a careful record and we asked the applicant to cooperate with us so that in any further tests there might be no question of fact involved. We think the case will turn squarely on the legal points we have raised in these exceptions. Since we think the Commission will be open minded on the matter but since it is obvious that we cannot hope to get across all of our arguments without presenting them orally, we have earnestly endeavored to give to the Commission as many reasons as possible why that privilege should be accorded us.

## CONCLUSION

A great many other errors could have been pointed out in specific detail. Since we have incorporated our brief in these exceptions we have refrained from repeating what was said there as far as it was possible to do so. Our failure to repeat many of the things there found is not to be taken as any indication that we do not regard them as equally important with the things discussed above.

This case we think presents an opportunity for the Commission to reexamine the bad doctrine and precedent established in some of the other railroad cases. We think it time for the Commission to pause and take stock of the situation. As we have endeavored to argue in our brief and in these exceptions, the Commission has in substance said that there is no method that can be followed by any of the protesting motor carriers that will in any way operate to defeat an application filed by a railroad or by its subsidiary. We therefore urge that the Commission review its past orders and with what we have said in mind again look to the statute and to the factual situation in our case.

In this case, we find such a tremendous issue involved, we earnestly ask the Commission to grant us the privilege of oral argument. We feel that a case of this importance should not be permitted to go any higher without affording both sides ample opportunity to question the stand of the Commission before it in person and in turn be subjected to the interrogations that always come from the bench. The manner in which the decision slights many of the important elements in the case cannot very well be set down in the confines of these exceptions. Oral argument is about the

only method that can be used in acquainting the Commission with many of the problems involved. In the other railroad cases the different factual situations we have mentioned may, or may not have justified the grant of authority for some reason other than that advanced by the Commission. In our case, however, we pray an opportunity to demonstrate that even if that doctrine is not revoked, it should not be here applied. The recent decisions of the Commission we have referred to agreeing with our conclusion warrant our asking for oral argument on that ground also. We desire an opportunity to show in detail how the factual situation closely parallel these late cases. Since the rights involved are so tremendous we protestants cannot permit the decision to become final, as we have pointed out from the beginning, unless and until we have exhausted every available remedy. We, therefore, earnestly beseech the Commission to grant us oral argument because this case, we think, will mark a milestone in the interpretation of the statute.

Furthermore, since this application is for some seven routes stretching more than the entire length of our state, it represents a tremendous grab for authority and business. Mere size of request seems to be one of the applicant's chief grounds for the authority. We can only properly demonstrate what this invasion of an already overserved field really means through an oral arguiment.

The fact that the Examiner in our case has adopted the decision in the Kansas City Southern case as governing has made it necessary for us to analyze that case rather thoroughly. He has not only adopted the conclusions but also the reasoning. This necessarily follows because even if he had not said that similar contentions were made in the Kansas City Southern case, it would be true because he could not very well adopt the conclusions without the reasoning. We therefore apply that reasoning to the facts in our present case to demonstrate the total inapplicability of both the reasoning and the conclusions.

In the Kansas City Southern case the Commission first decided that it was a new service. While as we point out elsewhere this is not true, in our case it distinctly is not the fact. Since we are rendering precisely the same service for another railroad and in the same area it follows that any statement concerning newness of the service has now lost its force. The statement about the act to the effect that Congress contemplated co-ordination can, of course, mean nothing here except that the railroad could accomplish that purpose if it would follow the example set by the Pere Marquette Railroad. The statement about the railroad's argument that they could get out of the less truck load business some other way has no applicability anywhere and is not of course in our case because there is no mention of this in the testimony presented

by the rails. The railroad contention in the Kansas City Southern case which the Commission adopted to the effect that there could be no bona fide co-operation between the railroad and independent carriers is likewise inapplicable here because the railroad not only has made no effort to co-operate but does not even have the slightest information concerning the service. It can hardly be said therefore that the railroad could have presented any proof on that subject. At any rate they did not do so. The Commission's argument about its inability to compel the railroad to join with the motor carriers in joint rates and through service does not as we point out elsewhere have any bearing on the issue. The fact that the railroad will not do so is the only important element to be considered. That certainly does not furnish an excuse for the grant of a new certificate. There are many things the Commission cannot compel. For instance, it cannot compel two carriers to divide revenue on any particular basis. In spite of that inability however it continually refuses extension of routes to common motor carriers on the ground that they could interline or interchange with other carriers and thus furnish satisfactory service. The statement by the Commission that the protestants had not suggested a plan for co-ordination in the Kansas City Southern case certainly cannot hold true here. We pointed out that we were performing the same service for another railroad in precisely the same way and that we could do so for the Pennsylvania. We not only pointed that out but also produced uncontroverted testimony that there was absolutely no difference in the kind of service the railroad testified they wanted and that which we are presently furnishing. The Commission's statement in the other case to the effect that the carriers serve other points and would have difficulty in adjusting their schedules is certainly not warranted by anything in the present record. We testified without contradiction that we could and would furnish the precise schedules that they wanted. In passing it may be worthy of note, however, that we demonstrated that the schedules the railroad proposes will not only not save time but will not meet the needs of the shipping public. It is uncontradicted that the motor carriers have a full and complete knowledge of the shipping needs of the public at these small towns. On that basis it was demonstrated that the rail proposal would find itself without use for all practical purposes because the shipper would not ship or receive at the precise time the schedule proposed. As a result it will be discovered that the railroad finally was forced to admit that these schedules were not definite and would probably be changed. As the record stands, therefore there is no certainty about what kind of service the railroad really would furnish. At any rate it cannot be said that the motor carriers seeking to furnish this service would have any

difficulty in adjusting schedules to meet the railroad's needs. They indicated a willingness to put on new schedules if that was required.

The things we have just discussed constitutes the entire list of reasons which the Commission seems to advance in support of its conclusion that the service must be rendered by the company owned carrier. Not a one of them apply to our case in any way. When the Commission said that they were persuaded that voluntary co-operation was not practicable in the Kansas City Southern case, they were really not referring to anything in the record of substance that would justify such a conclusion. But in our case we can say with positiveness that there is not a single fact that would justify a statement along any of the lines advanced in that case. Voluntary co-operation would be practicable in our case if the railroad would consent to use our service. The Commission certainly would not be warranted in saying that since the railroad will not do so, such co-operation is not possible and that therefore the certificate should be granted. To make such a statement would be to confirm everything that we have been protesting against in this case. It would amount to saying that the railroad can prove public convenience and necessity by saying that it will not do business with anyone else.

We believe that we are justified in saying that not a single bit of the reasoning, whether fallacious or not, set out in the Kansas City Southern case can possibly apply to the facts in our case. The Examiner, however, has predicated his decision entirely upon the reasoning and conclusions in that other proceeding. This we submit, not only does violence to the fact of record but does violence to all reason and logic.

The fact that the railroad is the real party in interest in our case just as it was in the Kansas City Southern case should make the Commission look with grave doubt and suspicion on any claim made by the railroad to the effect that it could not use independent motor carrier service. If the railroad is the applicant, then obviously, if it is to get the new certificate, it cannot admit that it would use the service available. If a motor carrier should advance such strange reasoning in support of one of its applications it would be laughed out of court. Surely the fact that the railroad has created a subsidiary corporation and not applied for the certificate directly is not to be considered as changing the essential nature of the argument. Neither should the Commission recognize such argument as a substitute for proof needed to show that the public cannot be adequately served by existing carriers. After all, it is public convenience and necessity the applicant must prove not merely convenience or even necessity on the part of its parent the railroad. We submit that in the Kansas City Southern and

other cases down to and including our own the only thing that has been shown has been convenience to the railroad plus a deliberate refusal to have anything to do with carriers already in the field.

We respectfully pray that the Commission make a specific finding that the protesting motor carriers do have sufficient and adequate service and facilities and can satisfactorily perform the service proposed in the application. We request that the Commission make a finding that the applicant has not made any showing that existing carriers cannot satisfactorily perform the service. That the public convenience and necessity does not require the grant of this new certificate. That the proposed duplication of service is contrary to the provisions of the statute and would be against public policy. We ask the Commission to specifically make affirmative findings on the various issues raised by these exceptions and our brief, and that such findings on each separate point agree with the contentions we have made in those documents.

The many errors by way of admitting or rejecting evidence can only be cured by a new hearing if this finding is not reversed. However, we think that oral argument should be had before any final determination is made by the Division because of the many other errors we have pointed out. We feel that the protesting carriers have not been given a full and fair trial of the cause on its merits. We say this because the Examiner has apparently determined the case on one ground alone. That ground is that the Kansas City Southern and other cases have determined in advance that whenever a railroad seeks a right it must be granted even though the record clearly shows that the carriers already in the field can and will furnish the service. The Examiner has said so in almost as many words. This is bad law and it obviously should not be allowed to stand. Any rewriting of the order without giving us an opportunity to be heard, if it reaches the same conclusion, cannot cure those errors. We must insist to the end that protestants be given an opportunity to have its case fully considered. This can only be done by permitting us to introduce the proof we were prevented from putting into the record and by having excluded therefrom the evidence to which we objected. We respectfully submit that we are entitled to an opportunity to be heard by the Commission and urge that this be set down at a reasonably early date.

Respectfully submitted.

INTER-STATE MOTOR FREIGHT SYSTEM,
PARKER MOTOR FREIGHT,
By K. F. CLARDY, *Attorney*.

Dated at Lansing, Michigan, October 29th, 1942.

(Note: The below inadvertently omitted from printed copy.)

The protestant, Inter-State Motor Freight System, has spent many hundreds of thousands of dollars in starting, promoting, and conducting its operations. Its main office is at Grand Rapids, Michigan. This is the heart of its system and it is also one of the principal points the applicant proposes to serve. The proposed order, if permitted to stand, will, therefore, destroy much of the value of this protestant's investment at one stroke. If an investment representing years of work and thousands of dollars is to be destroyed on the strength of the sort of evidence presented in this case, then the public interest is certainly being served in a strange fashion. Since applicant's proposal strikes at the very heart of this protestant's system, it will undoubtedly result eventually in badly crippling protestant's ability to serve many of the points the railroad presently does not propose to serve. The granting of this certificate, therefore, is in effect a gift worth untold thousands at the expense of one of the pioneers in the motor-carrier industry.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each such party.

Dated at Lansing, Michigan, this 29th day of October A. D. 1942.

K. F. CLARDY.

1150 BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-2815 (Sub. No. 6)

IN THE MATTER OF THE APPLICATION OF THE WILLETT COMPANY OF INDIANA, INC., FOR AUTHORITY TO EXTEND AN OPERATION AS A COMMON CARRIER OF COMMODITIES GENERALLY IN INTERSTATE COMMERCE

*Exceptions and brief in support thereof on behalf of Days Transfer, Inc., O. I. M. Transit Corporation, and Wolverine Express, Inc., to the report and recommended order of Examiner Walter W. Bryan*

Oct. 31, 1942

I. Exceptions to Report and Recommended Order

Come now Days Transfer, Inc., O. I. M. Transit Corporation, and Wolverine Express, Inc., by counsel, and hereby except to the following quoted finding of the examiner:

"The Examiner finds that present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce of general commodities, between the points, and over the routes shown in the appendix attached hereto and made a part hereof, * * *"

The finding quoted in part, above, is found on sheets four
1151 and five of the report and recommended order. The remainder of the finding, which is not quoted above, contains certain restrictions, including restriction number three which provides that "no shipments shall be transported by applicant as a common carrier by motor vehicle between any of the following points or through or to or from more than one of said points: Fort Wayne, Indiana, and Grand Rapids, Michigan."

To this finding protestants except upon the following grounds.

1. That said finding is not supported by the evidence in said cause.

2. That said finding is contrary to the evidence in said cause.

3. That said finding, as is apparent from the examiner's review of the case, in said report and recommended order, is based, in part, upon only that evidence of applicant and intervenor which is most favorable to applicant, and the rest upon fiction only.

4. That the examiner's report shows that his finding is arrived at without consideration being given to protestants evidence; adduced from applicant's and intervenor's witnesses upon cross examination and from protestants own witnesses upon direct examination.

1152 Wherefore, protestants respectfully pray the Interstate Commerce Commission to sustain these exceptions and that the Interstate Commerce Commission find as follows:

That public convenience and necessity do not require the proposed operations and that the application should be denied in its entirety, or

That public convenience and necessity require the proposed operation but that operations conducted thereunder shall be limited to the transportation of freight having a prior or subsequent movement by rail.

Respectfully submitted,

CLAUDE H. ANDERSON; and
WARREN C. MOBERLY,
*Attorneys for Protestants.*

## II. Brief in Support of Said Exceptions

### A. Argument.

Protestants desire to point out that the examiner making the report and recommended order in this cause, Walter W. Byran,

participated in the conduct of the hearing only on June 1
1153 and June 2, 1942, at Lansing, Michigan. This examiner did not participate in the conduct of the hearing held on February 10 and February 11, 1942, at Indianapolis, Indiana. In fairness to the examiner, the above facts are set forth here since these facts may be the cause of the erroneous report and recommended order entered by said examiner. Further, as stated in said report on sheet two, this case was referred to Joint Board No. 23, composed of members representing the states of Indiana and Michigan, and was heard by said Joint Board with Examiner Reece Harrison participating at Indianapolis, Indiana, and Examiner Bryan participating at Lansing, Michigan. Upon the failure of the Joint Board to agree upon a recommendation to the Interstate Commerce Commission for the disposal of this application, same was referred to the examiner for an "appropriate" recommendation. The recommendation was made by the examiner in his report and recommended order served September 14, 1942. The appropriateness of this recommendation is discussed hereafter in this brief.

To bring out the fallacy of the examiner's finding, counsel will discuss the examiner's references to the evidence, and the facts established by the evidence. In paragraph four, sheet two, of his report, the examiner makes this statement:

"The above mentioned traffic will be transported by rail between key or break-bulk stations and thence by truck to the intermediate or way stations. Conversely, applicant would collect freight at the way stations and transport it to the key stations for movement beyond by rail."

The examiner evidently has misunderstood the operations
1154 proposed by applicant. By all of the testimony presented by applicant's witnesses and the witnesses of intervenor supporting applicant, it is clearly stated that applicant proposes to transport freight from intermediate or way stations through either one of the break-bulk stations or key points to final destination at other so-called way stations, in interstate commerce, as well as to transport said freight from one way station to a break-bulk station, or key point, for transfer to rail cars for further delivery. That is, applicant does not intend to pick up freight at points north of Grand Rapids, Michigan, a break-bulk station or key point, and always turn same over to the railroad at Grand Rapids, but applicant in many cases does intend to transport said freight through Grand Rapids and deliver such freight to points in Indiana north of Fort Wayne. This situation also applies to the transportation of freight from points in Indiana north of Fort Wayne through Grand Rapids for delivery at points north

of Grand Rapids. This is the first example occurring in the examiner's report showing his misconception of the evidence and the issues in this case.

In paragraph two, sheet three, of the report the examiner states as follows:

"The railroad will continue its rail service to all of these points (referring to the intermediate or way points covered by the application) in transporting carload freight but will discontinue the operation of the 'peddlar cars' on the local freight trains."

A similar statement was made by witness E. M. Christie, agent on special duty, Pennsylvania Railroad, in his direct examination by applicant's counsel. However, in the cross-examination
1155 of Mr. Christie, by counsel for protestants, he admitted that the "peddlar cars" would be continued in operation over the rail route paralleling the route covered by this application for service to and from the intermediate or way stations. This witness admitted, in that cross-examination, that these "peddlar cars" would still be utilized for an undetermined amount of freight, less-than-carload freight, moving from and to the intermediate or way points. These conflicting statements were pointed out by us in our brief filed in this case prior to the serving of the report and recommended order, and within the time allowed by the Joint Board and subsequent extensions of time by the Interstate Commerce Commission. Obviously, the examiner has referred only to that testimony which is most beneficial to applicant, and intervenor, and has wholly ignored the statement by intervenor's witness, on behalf of applicant, in his cross-examination by counsel for protestants.

The second sentence of said paragraph two, sheet three, is quoted as follows:

"By eliminating the 'peddlar cars' it will enable the railroad to release a number of rail cars to be used in through-train service; will also enable the railroad to reduce its transit time to the various way stations from twenty-four to forty-eight hours; will eliminate over 61,000 car miles per month; will increase the efficiency of the railroad by eliminating the expense of substituting the 'peddlar cars' to and from the freight platform; and will result in heavier loading of cars by the consolidation of less-than-carload shipments into one car for each key point."

From the testimony as it appears in the transcript of this cause, the examiner is unwarranted in assuming, or inferring, that the "peddlar cars" will be eliminated. The testimony of wit-
1156 ness E. M. Christie, on cross-examination, states clearly and unequivocally that the "peddlar cars" will be continued in operation over the route involved. Consequently, those

cars cannot be, and will not be, released for service elsewhere. Also, on cross-examination of intervenor's witness and applicant's witness, E. M. Christie and J. P. McCardle, the statements made by those witnesses on their direct examination relative to reduction of time in transit was disproved. Both of those witnesses stated that unless freight was tendered applicant for transportation at very early morning hours such freight would be delayed twenty-four hours before starting in transit under the operating schedules proposed by applicant and introduced as exhibits in this case. That is, unless south-bound freight originating at points north of Grand Rapids was tendered to applicant prior to 10:00 o'clock in the morning, the scheduled departure time for applicant's trucks, that freight would have to remain on the railroad's docks until the next morning, thereby causing a twenty-four-hour delay in the start of that freight in transit. The same situation prevails, under said operating schedules, for freight originating in Indiana north of Fort Wayne destined to points in Michigan. Protestants carrier witnesses, long experienced in transporting freight and serving shippers in this territory, stated that the shipping public in the points involved could not, and would not, have freight ready for shipment until mid afternoon each day. That such shipping hours were customary and integrated with business conditions in the points involved. Here again, the examiner has not dealt with all of the evidence in the cause but has merely picked out a small portion of it which is most favorable to applicant. He has not even considered all of the evidence given by applicant's own witnesses.

1157 Under all the rules of practice and procedure, an applicant is bound by the statements of his own witnesses, whether those statements are made on direct examination or cross-examination. The saving of car miles, and the increased efficiency of railroad operations, referred to by the examiner in the sentence quoted above, are conclusions likewise based upon the consideration only of testimony most favorable to applicant, ignoring the rest of the testimony given by applicant's own witnesses and protestants witnesses. Such savings and increased efficiency of operations are not established by the evidence. Applicant's and intervenor's witnesses stated in their direct examination, that such savings and increased efficiency will result from the proposed operations, but, in their cross-examination these same witnesses admitted that the savings and increased efficiency will not result. Where witnesses so clearly contradict themselves, their testimony must be ignored; not even that which is favorable to applicant can fairly be used. No man can determine which statement is the truth and which is an untruth. The last portion of the sentence

quoted above evidently came from the examiner's imagination and not from anything in this record. There is no testimony to the effect that a heavier loading of cars between the key points will result from the institution of the operations proposed. Intervenor's witnesses stated that the railroad will continue to use consolidated cars of less-than-carload shipments between the key points, Fort Wayne, Indiana, and Grand Rapids, Michigan, and there can be no increase in this carloading, because, under the existing method of operation the railroad brings in less-than-carload freight from the way stations to the key points and there consolidates that freight for movement out of one key point
1158 to the other. If any change in this situation results from the institution of the proposed operations, that change will be a decrease in the carloading of this less-than-carload freight because some of that freight which is now handled from one key point to the other, and then peddled back to some way station will be handled direct from point of origin to destination by motor vehicle equipment, thereby reducing such consolidated movements between key points and wearing out vital motor vehicle equipment in the process. This condition is clearly established by the evidence given by E. M. Christie, witness for intervenor, in absolute contradiction of the statement made by the examiner, referred to above.

The last sentence of paragraph two, sheet three, relating to the effect the institution of the proposed operations might have upon employees of the railroad, is a most interesting statement. If we disregard the statements made by intervenor's witness on cross-examination and accept at full value the statements that witness made on direct examination relative to the alleged savings of cars, car miles, and operating time, there can be only one effect upon the railroad employees and that effect is a reduction in hours of employment and the resultant reduction in wages earned. In fact, Mr. Christie stated that such a reduction in working hours would result. If the working hours of such employees are reduced their pay checks will be reduced pro rata. There can be no other result. If, however, we are to accept as facts the statements made by Mr. Christie on cross-examination relative to the continued operations of "peddlar cars" the sentence referred to above will be correct; that is, there will be no reduction in working
1159 hours, and likewise, no reduction in the size of the pay checks received by the railroad employees.

The second sentence on sheet four of the examiner's report is as follows:

"The present rail service on less-than-carload shipments is slow and the witnesses (applicant's shipper witnesses) state that if the

service proposed herein would expedite the movement of these less-than-carload shipments to their places of business, then such service would be a decided convenience and necessity to them."

Protestants challenge the examiner, and anyone else, to find one statement in the transcript where a shipper witness for applicant stated that the proposed expedition of service was a necessity to him. Such a statement does not appear in the record at any place. The most that any shipper witness for applicant stated was that such an expedition would be a convenience. Everyone of the witnesses who testified, and the stipulations of those who did not testify in person, showed that all of said shippers and receivers had available to them all of the transportation service which they needed. There was absolutely no showing whatsoever that any new or changed service was needed by any shipper or receiver of freight. There certainly is a distinct difference between the meanings of "convenience" and "necessity". The Commission repeatedly has held that mere convenience to a shipper is not sufficient upon which to base a grant of new or extended authority to any motor carrier. The Commission has always held that proof of necessity must be advanced to warrant such a grant of authority. Protestants submit that there has been absolutely no proof of any necessity, to shippers or receivers of freight, for the proposed service.

1160 From lines 12, 13, 14, 15, and 16 of the first paragraph on sheet four, the following quotation is taken:

"* * * and they (referring to protestants carriers) take the position that the existing motor carriers in the considered territory should be afforded opportunity to improve their present services and facilities before authorization for new service is granted."

This statement infers that the motor carrier protestants are not rendering an adequate service to the shipping and receiving public in the points involved in this application. Such a statement, and the obvious inference, is most unwarranted and a figment of imagination. There is not one word in the transcript of this cause which justifies such a statement and the obvious inference. To the contrary, each witness appearing for protestant motor carriers, without exception, stated that the carrier which he represented made available to the shipping and receiving public more service than was needed by the shippers and receivers in the points involved. The testimony showed that everyone of the motor carriers protesting this case had available motor vehicle equipment which was not being used because of the low volume of freight moving in the territory involved. Further, each witness of said protesting motor carriers stated that the motor vehicle equipment that was being used by his company was not

filled to capacity. Further, the shipper witnesses appearing both for applicant and protestants stated that the motor carriers serving the territory rendered much more expeditious service than that rendered by the railroads and that the service rendered by such motor carriers was faster than the proposed service
1161 even if the twenty-four-to forty-eight-hour expedition of deliveries was achieved as applicant's witnesses testified would result from the institution of the proposed services. Protestant carrier witnesses did state that their respective companies were willing to secure additional equipment if same became necessary to handle traffic moving in the territory involved. Also, each of those witnesses stated that their respective companies were willing to enter into arrangements with intervenor whereby their companies, protestants herein, would perform the same service for intervenor as applicant herein is proposing to do. Here again, the examiner has gone beyond the record or has not even considered the record in preparing his report and recommended order.

For the reasons set forth herein, it is apparent that the finding of this examiner is not based upon the evidence; in fact, much of the examiner's reasoning cannot even be substantiated by considering only that evidence which is most favorable to applicant. The reasoning upon which the examiner has based his finding, as shown above, is clearly contrary to the evidence. If applications of this nature are to be determined by consideration of only that portion of the evidence which is favorable to applicant and by ignoring the evidence adduced from protestant's witnesses and from applicant's witnesses upon cross-examination, the very intent of the Interstate Commerce Act, as amended, is defeated. The Interstate Commerce Act was drafted and approved, and is being administered, for the purpose of promoting sound and economic transportation services for the shipping and receiving public and for the further purpose of protecting existing carriers from unwarranted and "cut-throat" competition. By basing a grant
1162 of authority only upon evidence most favorable to applicant and ignoring the evidence of protestants, the Interstate Commerce Commission would be issuing authority to every applicant who plays for same. This would "open the gate" for literally thousands of carriers to rush into operations, under Interstate Commerce Commission authority, over routes, and between points, now adequately, and more than adequately, served by existing carriers. This would bankrupt all carriers, make their services wholly irresponsible and cheat the shipping and receiving public out of the responsible and economic transportation services which the Interstate Commerce Act, through the Interstate Commerce Commission, has fostered.

If applicant is to be permitted to institute the operations proposed in this application, and recommended by Examiner Bryan, this case will be a precedent for the very result described above. A new competing service will be established without any proof of public convenience and necessity. A new grant of authority will be issued in defiance of the evidence produced at the hearing. A service will be instituted under the guise of being auxiliary to, or supplementary to, an existing rail service, when, in fact, the newly instituted service will be a new motor truck operation competing with existing motor carriers and not supplementing or augmenting any existing rail service.

If the service proposed herein is desired by applicant and intervenor to be purely supplementary to, or auxiliary to, the existing rail service, the authority might be granted with
1163 the "prior or subsequent movement by rail" restriction without too seriously affecting the interests of common carriers by motor vehicle serving the territory involved. Such a restriction would insure the new operation as being, in truth and in fact, supplementary to, or auxiliary to, existing rail service and would not be objectionable to protestants represented by us. However, any grant of authority as prayed for in this application, with only the key point restriction, and as recommended by the examiner, is totally obnoxious to said protestants and seriously endangers their very existence as efficient economic motor carriers and must, and will be, opposed as strenuously as possible.

B. Conclusion.

Wherefore, protestants respectfully pray the Interstate Commerce Commission to sustain these exceptions and that the Interstate Commerce Commission find as follows:

That public convenience and necessity do not require the proposed operations and that the application should be denied in its entirety, or

That public convenience and necessity require the proposed operation but that operations conducted thereunder should be limited to the transportation of freight having a prior or subsequent movement by rail.

1164 Respectfully submitted.

CLAUDE H. ANDERSON, and
WARREN C. MOBERLY,
*Attorneys for Protestants.*

## III. Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each party.

Dated at Indianapolis, Indiana, this 31st day of October 1942.

CLAUDE H. ANDERSON,

1166 BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-2815, Sub No. 6

IN THE MATTER OF THE APPLICATION OF THE WILLETT COMPANY OF INDIANA, INC., EXTENSION

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*Exceptions to report and order recommended by Walter W. Bryan, Examiner, and brief in support thereof*

Nov. 2, 1942

Come now Norwalk Truck Line Company and Norwalk Truck Line Company of Indiana, Inc., protestants herein, and respectfully except to the Report and Recommended Order of the Examiner herein, as served on the 14th day of September 1942, upon the following grounds:

1. The finding that public convenience and necessity require the proposed operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities over routes specified in the application is not supported by the evidence, and is contrary to the evidence.

2. The grant of authority to applicant, as recommended, would be against the weight of the evidence.

3. The grant of authority to applicant, as recommended, would not be in the public interest.

1167 BRIEF IN SUPPORT OF EXCEPTIONS

In view of the discussion of the record and the arguments relative thereto as contained in the several briefs filed herein by protestants following the hearings, counsel will not engage in an extended discussion of the exceptions herewith urged as grounds for rejection of the Examiner's Report and Recommended Order.

Insofar as shippers and receivers of freight are concerned (and these are the ones, we insist, who constitute the "public" to be

considered in this matter) the basis of a finding of public convenience and necessity as to them is summed up in paragraph one, sheet 4, of the Examiner's Report wherein it is stated with reference to the testimony of applicant's "shipper" witnesses that—

"In substance, their testimony is that they are now using the rail service in both carload and less-than-carload shipments. The present rail service on less-than-carload shipments is slow and the witnesses state that if the service proposed herein would expedite the movement of these less-than-carload shipments to their places of business, then such service would be a decided convenience and necessity to them."

The evidence shows that daily service by motor vehicle is now available to every city, town, and hamlet along the proposed route and no evidence of moment was produced to negative the conclusion that such service is ample to supply every reasonable need therefor. To hold, in the face of such proof, that public necessity now demands another trucking service along this route,
1168 whether it be "Auxiliary or supplemental" to Pennsylvania Railway Service, or otherwise, is to introduce into the dictionary of legal terms a distinctly new and novel definition of the term "public necessity."

A considerable portion of the Examiner's report is devoted to a discussion of the condition attached to previous certificates issued to the applicant, viz: that—

"Shipments transported by applicant shall be limited to those which it receives from or delivers to the railroad under a through bill of lading covering in addition to movement by applicant, a prior or subsequent movement by rail."

The conclusion is that this restriction should not be imposed in the instant case and that, instead, the action of the Commission in Kansas City Southern Transport Company, Inc., 28 M. C. C. 5, should be followed. With this conclusion these protestants, for the reasons urged in the original briefs filed herein, emphatically dissent. Shipments subject to the quoted condition would necessarily cross the Indiana-Michigan State line and the evidence is indisputable that ample transportation facilities by motortruck now exist for the accommodation of any and all traffic which may move in interstate commerce between any points on the routes proposed to be served by applicant. Under present conditions it is particularly absurd to anticipate that any shipper on any of these routes would, or could legally, demand that the Pennsylvania Railroad operate local freight trains for the transportation of such freight as might be offered to it for carriage between two points where such carriage did not involve a prior or subsequent movement by rail.

1169 In conclusion we again assert that "the public interest may best be served by a denial of the application" in its entirety and we therefore urge that the Report and Recommended Order as submitted by the Examiner under date of September 14, 1942, be rejected and that in lieu thereof an order of denial of the application be entered.

Respectfully submitted.

NORWALK TRUCK LINE COMPANY,
NORWALK TRUCK LINE COMPANY OF INDIANA, INC.,
*Protestants.*

By FRED I. KING, *Attorney for Protestants.*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding, by mailing a copy thereof, properly addressed, to each party.

Dated at Indianapolis, Indiana, this 30th day of October 1942.

*Attorney for Protestants,*
*Norwalk Truck Line Company and*
*Norwalk Truck Line Company of Ind., Inc.*

1176 BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-2815—Sub. No. 6 (Form BMC-74)

IN THE MATTER OF THE APPLICATION OF THE WILLEPT COMPANY OF INDIANA, INC., FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY AS A COMMON CARRIER OF COMMODITIES GENERALLY BY MOTOR VEHICLE IN INTERSTATE COMMERCE

*Applicant's reply to exceptions of Protestants Interstate Motor Freight System, Parker Motor Freight, Days Transfer, Inc., O. I. M. Transit Corporation, Wolverine Express, Inc., Norwalk Truck Line Company, Norwalk Truck Line Company of Indiana, Inc.*

Dec. 18, 1942

1

EXCEPTIONS FILED

To the reply and recommended order of the Examiner herein three different sets of Exceptions were filed, as follows:

1. On October 29, 1942, Exceptions were filed on behalf of Inter-State Motor Freight System and Parker Motor Freight.

2. Exceptions were filed on October 30, 1942, on behalf of Norwalk Truck Line Company and Norwalk Truck Line Company of Indiana, Inc.

3. On October 31, 1942, Exceptions were filed on behalf of Days Transfer, Inc., O. I. M. Transit Corporation and Wolverine Express, Inc.

The applicant will reply to each of these Exceptions in the order named.

## II

### Reply to Exceptions of Inter-State Motor Freight System and Parker Motor Freight

### IIA. Extracts—Testimony of Applicant's Witnesses

In order to answer some of the contentions of protestants regarding the evidence, we think it advisable to set forth a few brief summaries or extracts from part of the pertinent testimony of not only applicant's shipper witnesses, but also the protestants' shipper witnesses. In the light of this testimony it will be seen that there is no foundation for the claimed exceptions of the protestants.

First, we set forth some of these extracts regarding applicant's shipper witnesses.

#### Claude H. Caton

We set forth the following from the testimony of applicant's witness Claude H. Caton, located at LaGrange, Indiana:

DIRECT EXAMINATION

If this particular rail-truck service is instituted and it will expedite the movement of our Pennsylvania Railroad freight 24 hours, it will be of benefit in our business (Tr. 312); and it will serve the convenience and necessity of our particular business; it will help us (Tr. 312).

If this service is instituted for The Pennsylvania Railroad by The Willett Company, our company will continue to use The Pennsylvania Railroad and avail itself of the rail-truck service (Tr. 312).

We would like to have that service (Tr. 312–313).

CROSS-EXAMINATION

The truck service we receive from Chicago is slow—slower than rail (Tr. 322); it takes 3 days by rail and several by truck (Tr. 322); by truck it was several days, although I wouldn't be

capable of giving you the exact time because I know we were very anxious for the goods and in some way or other, they got mixed up in the transfer and they did not come by way of a direct line, but they came into South Bend and they were transferred to one of the other lines, or else they just laid over there, or something, and we had to follow the shipment up (Tr. 322); it was considerably over three days by truck (Tr. 322). I think Matthas and Mills render about a three-day service from Chicago, operating out of South Bend (Tr. 323).

I get O. I. M. shipments from Detroit. Also some other carrier brings a shipment from Detroit and sometimes they change them, they ship them to South Bend from Detroit and then they double back, or something like that (Tr. 324). I have suggested to the shipper that he route his shipment by some line that comes directly but they insist on using Mills and this other carrier (Tr. 324–325). It takes O. I. M. two days from Detroit; O. I. M. takes the shipment to Fort Wayne and then doubles back, out of Fort Wayne to LaGrange; they do not pass through LaGrange except in one direction, I am quite positive of it (Tr. 325–326).

Regarding the effect on the damage claim, I will make this statement, that when your shipments are handled directly by the railroad all the way through, and you have to have a damage claim, you will be much more apt to get a quicker return from handling your damage claim with one claim Department than you will be if you have to go through two or three trucking companies with it (Tr. 331–333).

### M. L. Button

We set forth the following from the testimony of applicant's witness M. L. Button, located at Allegan, Michigan, and connected with Angle-Stool Company at Plainwell, Michigan:

#### DIRECT EXAMINATION

If this particular service is instituted and if they thereby give us an expedited service of 24 hours through this rail-truck service of The Pennsylvania Railroad and The Willett Company, that will serve the convenience and necessity of our company. (Tr. 351–352).

We are confronted with the fact that we have competition; we are located in Michigan and our competition is located in the East and around through Illinois; and 24 hours, of course, will make a day and nowadays, people want things when they want them; they do not want to wait and if you can get our shipments in 24 hours quicker, why that is going to help our business. The company is going to demand that I get them in there the quickest way

I can and the customers are going to demand that I get them out the quickest way I can; and we would like to have this expedited service (Tr. 354).

CROSS-EXAMINATION

We are not using the service of common motor carriers on longer hauls unless we can help it; only when it is routed that way (Tr. 358). We are using on inbound shipments a number of carriers but they are selected by the shippers; we used to use Wolverine Express to bring us paint from Chicago, but we were unable to depend upon them so it is brought in by Associated Truck Lines now (Tr. 359).

There is no motor carrier serving us in either direction from Cleveland except once in awhile when the customer demands it; we prefer to ship by rail if we can get it that way.

With respect to time, The Pennsylvania Railroad's rail service we get it in two days; by trucks, we have never had it in less than four days because it is held up in Toledo (Tr. 361); I could not say what truck line holds it up because when we make a complaint or send a tracer through on something, they will say, "Well, it was held up there." They have half a dozen different lines picking up at the terminal in Toledo (Tr. 361).

My understanding of this proposed service is The Pennsylvania Railroad will pull the freight on the railroad as far as it can and then when it gets to a place where it is slowed up like between Kalamazoo and Grand Rapids, where our local train runs one day north and the next day south, this truck will speed up that service because we will get one truck north and one truck south every day rather than every other day (Tr. 364).

As far as our interest is concerned in this proposed service is that we need a 24 hour speeding up of the service (Tr. 367).

In other words, we do not care whether they actually get it in there late, so that it could not catch the train, to make the connection, or not, but if they will speed up the service, as far as the movement of any particular shipment is concerned that is what we request (T. 368).

We are interested in seeing the railroads speed up this service (Tr. 368). Even if the supposed truck out of Kalamazoo had anything to do before it got to our city, even if it made the 4:00 o'clock schedule, it would not pass us on that day because the truck would drop the freight at the railroad station and we would pick it up at the railroad station the next morning (Tr. 370).

The Pennsylvania Railroad told us they would speed up our shipments reaching Plainwell by 24 hours and that is all we are asking (Tr. 391).

### Edward F. Zinkel

We set forth the following from the testimony of applicant's witness Edward F. Zinkel, located at Conklin, Michigan:

#### DIRECT EXAMINATION

It has been explained to me that The Pennsylvania Railroad through The Willett Company proposes putting on a truck between Grand Rapids, Michigan, and that it will expedite the movement of our in-bound and out-bound shipments at least 24 hours. If this service is rendered, it will serve the convenience and necessity of our business and we would like to have it instituted (Tr. 399-400).

#### CROSS-EXAMINATION

I own a truck, hold a contract, and my men do the pick-up and delivery for The Pennsylvania Railroad in Conklin and for other railroads; the Grand Trunk runs through Conklin; no promise has been made nor representations as to whether or not they will continue with my contract (Tr. 404); I operate one piece of equipment (Tr. 405).

The present service I am receiving from The Pennsylvania Railroad is not satisfactory, it is too slow (Tr. 405).

Bishop Truck Lines is the only truck line that operates through our town (Tr. 405); it is off the state highway, north about seven miles and the closest town is Coopersville; it's about 6 or 7 miles (Tr. 406). I have been doing this pick-up and delivery service for the railroads for four years but I will gladly turn it over to anybody else.

### George M. McDowell

We set forth the following from the testimony of applicant's witness George M. McDowell, located at Reed City, Michigan:

#### DIRECT EXAMINATION

If this service is instituted as explained to me as I have indicated, it will serve the convenience and necessity of my business and I would like to have this truck service instituted and if it is instituted will continue to use the service of The Pennsylvania Railroad (Tr. 417-418).

II-B. Stipulation Regarding Applicant's Thirty-eight Shipper Witnesses.

Each and every one of the thirty-eight stipulations contains the following six exact paragraphs and stipulations:

1. That he is acquainted with the inbound and outbound shipments which his company ships.

2. That his business does now and has for ——— years used the services of The Pennsylvania Railroad Company over one of the routes described in the application. (In each instance, naming the number of years and specifically stating the exact route.)

3. That the said outbound and inbound shipments which his company ships and receives over The Pennsylvania Railroad to and from the city in which his business is located, are as follows: (In each instance, there was named the approximate number of shipments, the weight of each, and the origin or destination points as the case might be; in total, amounting to millions of pounds of freight, constituting commodities generally) in interstate commerce.

4. The witness has had explained to him the service to be rendered in the rail-truck service by The Willett Company of Indiana, Inc., for The Pennsylvania Railroad Company over this route, serving his business.

5. He has also had explained to him that this rail-truck service serving his business, if instituted, will expedite the movement of the shipments to and from his business by The Pennsylvania Railroad Company 24 hours or more.

6. If such service is authorized by the Interstate Commerce Commission, it will serve the convenience and necessity of his business and his business will continue to use The Pennsylvania Railroad service in conjunction with the rail-truck service described in the application.

II-C. Stipulated Cross-Examination of Each of the Thirty-eight Witnesses

As hereinbefore shown the cross-examination of each of these witnesses shall be considered the same in substance as the cross-examination of the four shipper witnesses of applicant testifying in person.

We analyze this cross-examination applicable to each of these thirty-eight witnesses summarized as follow:

We don't use many of the truck lines (Tr. 31).

Present service of The Pennsylvania Railroad and the various truck lines that are serving us are adequate unless they could

improve on the service in some way or other, of course (Tr. 318–319).

The truck service we receive is, in some instances, slower than rail; it takes one day less by rail, in some instances (Tr. 322–323). In some of these instances we have suggested to the shipper to change the truck routing; some of the truck lines serve in one direction only (Tr. 324–326).

The only complaint against The Pennsylvania Railroad from certain points is that of damage; it is no fault of The Pennsylvania Railroad (Tr. 315–328). Some of the truck lines serving us are good and we have no complaint to make against that service (Tr. 316–317).

Regarding damage claims when shipments are handled directly by the railroads all the way through, and you have to have a damage claim, you will be much more apt to get a quicker return from handling your damage claim with one Claim Department than you will if you have to go through two or three trucking companies with it (Tr. 331–333).

Some of the truck lines serving our town have no regular schedule (Tr. 355).

We are satisfied with our truck service by short haul (Tr. 357–358).

We are not using the service of common motor carriers on long hauls, except when it is routed that way (Tr. 358), but we prefer to ship long haul by rail if we can get it that way.

As far as our interest is concerned in this proposed service, it is that we need a 24-hour speeding up of the service (Tr. 367). If they speed up the service to us as far as the movement of any particular shipment is concerned, that is what we request (Tr. 368). We are interested in seeing the railroads speed up this service (Tr. 368).

## III. Extracts—Testimony of Protestants' Witnesses

We also set forth some of the pertinent extracts from the testimony of protestants' witnesses as follows:

### Leo Miller

We set forth the following from protestants' witness Leo Miller, located at Sturgis, Michigan:

#### DIRECT EXAMINATION

The service of The Pennsylvania Railroad has not been good (Tr. 693). If one of these carriers does not have a truck in Sturgis, we pick up our own freight (Tr. 695).

CROSS-EXAMINATION

In any event, if The Pennsylvania Railroad were to have expedited that shipment which took seven days, as much as 24 hours in delivery, it would have helped out that much (Tr. 697) and we would have no objection if the shipment were expedited by The Pennsylvania Railroad (Tr. 698).

The witness then sparred over a number of questions and finally the following question was asked him, "I am just asking you now, Mr. Witness, with regard to the service of The Pennsylvania Railroad, not any truck line, and my question is, If The Pennsylvania Railroad can improve this service to you by giving you a quicker delivery, that would be of advantage to you, would it not?" Answer, "Absolutely."

After sparring on a number of other questions which indicated that the witness had not understood what the proposed service was (Tr. 701–703) he stated that he would not have any objection to the improved service of the railroad, expediting his shipment from Berne 24 hours, and that it would not in any way affect his business except beneficially (Tr. 703).

E. O. Nyman

We set forth the following from protestants' witness E. O. Nyman located at Petoskey, Michigan:

CROSS-EXAMINATION

At the present time we are receiving quicker service by two days by truck than by rail from interstate points.

If The Pennsylvania Railroad service could be expedited 24 to 48 hours, that would be beneficial to his company to that extent (Tr. 718).

No one has explained to him what The Pennsylvania Railroad was trying to do in this instance, that it was trying to expedite by 24 to 48 hours the movement of its freight in its rail service (Tr. 718).

Counsel for applicant then endeavored to get the witness to answer direct questions regarding the expedition of the service and the benefit it would be to his business and the witness's answers were unsatisfactory in that there was a sparring and hedging with counsel, so much so that Joint Board Member Eggers was compelled to say to the witness:

"Just a moment, Mr. Yockey. It appears to me at least that these questions are all very simple and are susceptible of being

answered by 'yes' or 'no.' I do not see why we have to have a lot of hedging around here." (Tr. 720.)

### E. J. Schmidt, Jr.

We set forth the following from protestants' witness E. J. Schmidt, Jr., located at Petoskey, Mich.:

#### CROSS-EXAMINATION

As to those points other than Chicago where we are shipping by The Pennsylvania Railroad in less-than-carload freight, if The Pennsylvania Railroad can, by instituting truck service part of the way, shorten the delivery time at destination, of those railroad shipments, that would be beneficial to our company (Tr. 736–737).

Naturally, it would benefit us if the railroads could expedite its service as indicated as far as inbound shipments are concerned also (Tr. 737–738).

### Charles E. Garthe

We set forth the following from protestants' witness Charles E. Garthe, located at Traverse City, Michigan:

#### CROSS-EXAMINATION

This witness squirmed and stalled also, and was admonished by Joint Board Member Barkell (Tr. 770–771) and finally said that if the railroads can speed its service up from 24 to 48 hours, that would be of value and benefit to his business (Tr. 771).

### E. W. Smiley, Jr.

We set forth the following from protestants' witness E. W. Smiley, Jr., located at Sturgis, Michigan:

#### CROSS-EXAMINATION

He uses Pennsylvania Railroad in inbound and outbound shipments in less-than-carload quantities (Tr. 789); he uses trucks because he gets quicker service; the rail service would appeal to him if it were quicker than it is at the present time (Tr. 792); and if these shipments can be expedited one or two days, that would be of a benefit to our business and desirable (Tr. 793); and we have no objection to The Pennsylvania Railroad so expediting its service (Tr. 793).

### E. M. Moore

We set forth the following from protestants' witness E. M. Moore, located at Sturgis, Michigan:

CROSS-EXAMINATION

Occasionally our company receives inbound shipments less than carload by way of The Pennsylvania Railroad in interstate commerce (Tr. 802); the time element required in shipments have a lot to do with it; it is an important factor and if that time element can be reduced by the railroad on particular shipments for the movement of which we are using the railroad both inbound and outbound, that would be of benefit to our company (Tr. 803); obviously, any improvement in the service would be an improvement and would be of a benefit to us (Tr. 804). Whatever the improvement is, we would very much like to have it (Tr. 804).

REDIRECT EXAMINATION

Wherever the service could be facilitated or improved, why of course I would be delighted, and obviously so; it makes no difference what truck line would give the service; perhaps I can answer the question this way, by saying that I would be very happy to get any extra service or any better service that might be made available, from whatever service it might come (Tr. 807).

### Victor S. Fleser

We set forth the following from protestants' witness Victor S. Fleser, located in Moline, Michigan:

I can't use the railroad service, but if it were improved, I would like to have an improved service, yes (Tr. 818).

### Thomas Clyde Patterson

We set forth the following from protestants' witness Thomas Clyde Patterson, located in Martin, Michigan:

DIRECT EXAMINATION

The time element is vital in connection with deliveries on our incoming freight (Tr. 834); in a lot of cases, a delay of 24 to 48 hours at time of delivery is vital to us (Tr. 834); we are using truck service because we are getting prompter service (Tr. 834).

CROSS-EXAMINATION

The witness was asked the following question:

"Well, now, Mr. Witness, would it be of advantage in your business if your shipment by rail could be shortened from 24 to 48 hours; that is, in the time of delivery, if that could be done?"

Answer, "Oh, you have asked me a foolish question."

Mr. BARKELL. "That is not a foolish question."

Mr. EGGERS. "That is what we are interested in knowing."

Answer, "All right, yes."

George Carlton

We set forth the following from protestants' witness George Carlton, located in Mackinaw City, Michigan:

That if The Pennsylvania Railroad should have The Willett Company put on some kind of an operation that would handle this particular commodity, that would be of present benefit to my business, as it has been explained to me (Tr. 900).

IV. DISCUSSION OF EXCEPTIONS NUMBERED 1 TO 12

From pages 58 to 85 of these exceptions there are set forth twelve different objections to findings of the Examiner. In some instances more than one objection is made under each specification. It is rather difficult to reply to these exceptions for the reason that the arguments are duplicated under many different headings. We will, therefore, endeavor to briefly discuss the objections raised under the twelve specifications, and then enter into a general discussion of some of the points raised thereunder and duplicated in other portions of the exceptions.

Specification No. 1

Applicant says regarding Specification No. 1:

"The factual findings of the Examiner with respect to what is sought and the manner in which the operations will be conducted, are generally correct."

The exceptions raises the proposition that these findings "are generally entirely in error" and then proceeds to give five different specifications under this number. We will discuss them as (a), (b), (c), (d), and (e).

Protestant objects to the Examiner's finding on Sheet 2 as follows: "the service is confined to transportation which is auxiliary to and supplemental of the rail service."

(a)

Protestants claim this finding is not correct; that the applicant wants to solicit truck business generally and will move the freight from many points without any prior or subsequent rail service whatsoever.

The protestants are entirely wrong in their statement. Applicant's official witnesses testified that under no circumstances does the applicant solicit any freight of any kind whatsoever, and that all of the solicitation of freight is done by The Pennsylvania Railroad in the regular course of its business, and that the applicant has nothing to do with it whatsoever, that its only business is that of a line haul operator in station to station operations and has absolutely no connection with the public whatsoever. All of the freight involved will move on the bills of lading and under the tariff of the railroad. The applicant has no tariffs nor bills of lading.

Many imaginary ghosts have been created by the protestants for the sole purpose of defeating this application and the statement that the applicant's truck business generally will move from many points without any prior or subsequent rail movement whatsoever is one of these imaginations. As a matter of fact, practically all of the freight will have a prior and subsequent movement by rail. There are a few points, and a few points only, where the freight will not have a prior and subsequent movement by rail, and the establishment of the two key points, Grand Rapids and Fort Wayne, will adequately protect everybody involved.

(b)

The second point raised under this specification by protestants is that the paragraph in Examiner's report set out on Sheet 2 wherein they say that it is only proposed to transport freight "originating on the lines of the railroad or its connections," and the protestants state that the record shows this is not true and that the applicant seeks to go far beyond that.

The finding of the Examiner in this respect is absolutely correct. All of the freight involved originates at points on the lines of the railroad or its connections or is destined for these points. The order restricts the applicant from serving any cities or towns that are not located on The Pennsylvania Railroad. The evidence is conclusive that not a single pound of freight will move except to or from one of these points on The Pennsylvania Railroad or its connections over the routes involved. It all must move on the railroad bills of lading. The applicant will have no connection with anybody except The Pennsylvania Railroad, and all of the

freight will come to it from The Pennsylvania Railroad or will be delivered by it to The Pennsylvania Railroad. Naturally some of the freight involved will come from the connections of The Pennsylvania Railroad, but the applicant will have absolutely no relationship with any of The Pennsylvania Railroad's connections.

(c)

The protestants claim that the Examiner's finding on Sheet 3, to the effect that it is proposed to render a more frequent and faster service to the various points along the routes is not justified by the record. This criticism is unfounded. The evidence in the record is to the effect that every point on the routes involved will receive a faster service and that the movement of freight will be expedited from 24 to 72 hours and that in many instances the service will be more frequent than that rendered by rail.

(d)

The protestants state that the Examiner's blanket finding in the next to the last paragraph on Sheet 3 (almost repeating verbatim the statement of the claims of the applicant with respect to the claims of the applicant) with regard to the savings, without citing anything in the record to support it, is a particularly bad error.

Protestants claim that these claims were shattered and thoroughly discredited at the hearing.

Mr. Christie testified at length and in detail regarding each and all of these claims regarding the savings. It will be remembered that protestants fought bitterly to keep all of this evidence out of the record.

Regarding all these claims we are not going to make answers in detail, and are not going to set forth all of the evidence under these specifications, but at another point in the reply we will set forth briefly the evidence which will refute all of the points involved and show clearly what was testified to at the hearing.

(e)

The protestants claim that "the Examiner's finding on Sheet 2 to the effect that 'all of the transportation will be moved under bills of lading issued by the railroad is one of the gravest errors in the entire report.'"

Wherein this finding is erroneous is not shown by the protestants. The evidence is clear and uncontradicted that all of the transportation will be moved under bills of lading issued by the railroad or its connections; that applicant issues none and does not propose to issue any.

Protestants then assert that the railroad and the applicant will be thus violating all the rules of the Commission and plain provisions of the statute and that this is discriminatory in the worst form. They claim that the railroad and the applicant propose to violate the statute and then to use that very fact as one of the prime reasons why this particular applicant should be granted the authority. What rules of the Commission are thus violated, or what plain provisions of the statute are involved the protestants do not state?

Specification No. 2

The applicant contends that the findings of the Examiner that "supplementing the evidence of applicant and railroad employees 42 shippers representing various businesses at points located on the proposed route, testified as to the necessity for and convenience of all of the considered services." The protestants make no claim in their point that this was erroneous but in their discussion they argue apparently that it was.

We have set forth at other places in this reply excerpts from the evidence of the witnesses, which, in itself, will refute the claims made by protestants under this specification. However, there are two principal objections raised under this specification and we will discuss them as (a) and (b).

(a)

Protestants object that not a single one of these witnesses testified that there was any actual need for the service. We have shown at another place in the reply that every one of the 42 witnesses so testified for the applicant and that most of the shipper witnesses for the protestants so testified.

(b)

Protestants claim that the witnesses for the applicant merely testified that it would be to their convenience to have the faster service than that presently received. This statement is equally incorrect, as will be seen at another place in our reply where we set forth excerpts from the evidence.

This claim is rather inconsistent with protestants' objection to the finding under specification (b) point (c) hereinbefore discussed, wherein it is claimed that the finding of the Examiner is unjustified that the applicant proposes to render a faster service to the various points along the route.

Specification 3

The applicant states that "the finding of the Examiner set forth on Sheet 4 that these witnesses testified that 'such service would be decided convenience to them' is correct."

Under this specification the protestants claim that this is not correct.

Again we refer to another portion of our reply where we have set forth extracts from the evidence and there it will be seen that every one of applicant's 42 witnesses testified that the proposed service would serve their convenience and necessity and many of them showed specifically what importance it was to them, in expediting the movement of their freight.

Specification 4

Under this specification protestants object to the Examiner's statement that

"The statement by the Examiner on Sheets 2 and 3 that he gave consideration to another applica by this applicant and that facts in that case were partially responsible for the determination of the issues in this case."

Protestants do not set forth the wording in the finding which he objects to, but it is as follows:

"The proposed operation will be conducted in the same manner and under the same conditions as those operations now conducted by applicant over its present authorized routes, all of which were considered and discussed at some length by the Commission, Division 5, in Willett Company of Indiana, Inc., Extension—Illinois, Indiana and Kentucky, supra, and therefore no further discussion along this line is necessary."

The evidence in the present case is uncontradicted that the applicant is now operating exactly the same type and kind of service for The Pennsylvania Railroad over its 25 routes now in operation and that the proposed service is exactly the same type and kind. By no stretch of the imagination can it be error to refer to this former case.

Immediately following on Sheet 3 the Examiner continues as follows:

"However, in the above mentioned case Division 5 attached certain conditions to the authority granted with a view of assuring that the authorized transportation would not be a duplication of and in competition with existing highway service. One of these conditions was as follows: 'Shipments transported by applicant

shall be limited to those which it receives from or delivers to the Railroad under a through bill of lading covering in addition to movement by applicant, a prior or subsequent movement by rail."

The Examiner goes on to refer to the original Kansas City Southern case, 10 M. C. C. 221, and then refers to the fact that subsequently in the latter proceeding reported in 28 M. C. C. 5, the Commission modified the requirement to permit the motor carrier to transport traffic which had not received a prior or subsequent movement by rail.

And at a later date a key-point restriction was inserted in the Kansas City Southern case in lieu of the prior and subsequent movement by rail clause.

These references by the Examiner to the prior Willett case and the Kansas City Southern case are entirely proper and commendable. The facts in the prior Willett case and the present Willett case are absolutely identical. Protestants make no showing at all that the facts are different.

This does not amount to, as stated by protestants, that the case was already decided before it was heard, that no useful purpose would be served by discussing it.

The protestants then proceed to say that "the applicant throughout the proceeding indicated that he felt he had the case already won before it was tried on the basis of precisely what the Examiner has now said." Protestants claim that this is not fair and say that it is not in accordance with due process or the rules of the Commission.

It is very difficult for one to restrain himself in making reply to such baseless accusations.

Just wherein it is not in accordance with due process or the rules of the Commission the protestants do not say.

Protestant then proceeds to say that "this has been a particularly grave exhibition of disregard of the record and we feel that the entire matter should be reopened and gone into thoroughly before any final disposition is made."

The only reply which we care to make to such an accusation is that the only reason for any kind of reopening would be for the specific purpose of a calling to account for the making of such baseless charges against an Examiner.

Under this specification the protestants final paragraph asks that a finding be made that the prior cases mentioned by the Examiner have no application to the present case.

This last criticism is likewise without merit and falls in the same category as the other objections hereinbefore referred to.

Specification 5

Under this specification protestants claim it was error upon the part of the Examiner "in excluding the limitation heretofore imposed on the railroad by giving consideration to the facts of record in other cases, but upon which there was no showing in this case as set forth on Sheet 3." We have discussed all the objections of protestants under its Specification No. 4.

Protestants seem to be under the illusion that the Examiner is required to make a recital of all of the evidence on a point in the case to support any finding he may make. They object to the discussion of the change of the conditions from prior and subsequent movement by rail to key-point restrictions.

Since when is it error for the Commission to cite other cases as authority for its action in an instant case? There have been dozens of like cases before the Commission. In the earlier cases the prior and subsequent movement by rail clause was inserted, but as the Commission gained more experience and had more evidence presented to it in the various cases it in many instances changed the prior and subsequent movement by rail clause to key-point restrictions. We have discussed the prior and subsequent movement by rail clause and key-point restrictions at another place herein and therefore will not go into the matter at length here.

Again under this specification is made the usual claim of no evidence, lack of due process and no showing of any kind as to how due process was violated.

Protestants then complain regarding their unsuccessful efforts to introduce certain testimony regarding conversations had with certain of the applicant's witnesses during the interim between the first and the second hearings herein, and seem to think that the case should be reopened for that purpose. There is no merit in this claim. Witnesses cannot be impeached in this manner.

Objection is then made that the applicant was permitted to present a great deal of evidence dealing with claimed advantages to the railroad. Insistence is made by protestants that these rulings were error. They claim that the testimony that the parent will benefit by the actions of the child if the authority is granted, clearly is not competent evidence to prove anything, and then claim, that "yet the whole order hangs on that testimony" and then again is made the statement that due process is violated. And again the request is made for reopening.

We cannot tell exactly what testimony is objected to, but apparently it is the complaint regarding the admission of the testimony regarding savings that will be made to The Pennsylvania

Railroad. It is a fact that this type of testimony has been favorably received by the Commission in dozens of cases, in fact in every one of the rail-truck cases this type of testimony has been admitted and favorably commented on by the Commission, and considered by it on the question of convenience and necessity. The Commission has repeatedly held that this saving to the Railroad is of a public benefit and that it benefits the shipping public because any benefits to the railroad is naturally passed on the shipping public. Yet the protestants believe that due process has been violated. It is well to keep in mind that at no point do the protestants ever make any specific claim as to what they mean by due process.

Counsel for applicant can well appreciate the attitude of protestants in feeling that more mention should be made in the reports and findings of Examiners, Divisions and the Commission in setting forth rulings on errors alleged to have been committed. We do not believe there is any objection that lawyers have against Courts and Commissions more than this complaint. Suffice it to say the Courts and Commissions have never completely satisfied the legal profession in this matter, and I suppose they never will. There is no question regarding the law as to the fact that the Commission is not a judicial body, but a fact finding body. It therefore is not governed by all of the rules and restraints of Courts. Lawyers are naturally in the habit of looking to and citing precedents and are always anxious to have the points raised by them in cases definitely decided by Courts and Commissions so that the same will not only be of benefit in an instant case but also that the same may be used as precedents in other cases. The Commission has on a number of occasions held that it not bound by the rules of res judicata. Protestants cite no authority of any kind sustaining their positions. There is no such authority. The Commission is not compelled as a fact finding body to set forth a volume of evidence in its findings.

Specification No. 6

Under this specification protestants object to the finding of the Examiner that the protestants "take the position that the existing motor carriers in the specific territory should be offered opportunity to improve their present service and facilities before authorization for new service is granted."

Protestants make the usual objections under this specification that there is no evidence, etc. Applicant believes the finding is a fair conclusion and finding to be drawn from the evidence. Protestants took the position that the applicant and The Pennsylvania Railroad did not understand the needs of the shipping pub-

lic and that the protestant carriers did, and that the services of the protesting carriers was scheduled to meet the demands of the shipping and receiving public as they understood and as the Railroad and applicant did not. Their evidence was and the exceptions state that the protesting carriers have practically no less than carload freight to the intermediate towns along the routes involved, but that nevertheless they understand what schedules of operation are necessary. They state that in many instances the proposed schedule l operations of the applicant are not in line with the needs of the public. Mr. Christie, testifying on behalf of The Pennsylvania Railroad, very clearly stated that the schedules in the main were correlated to the schedules of The Pennsylvania Railroad. This was not comprehended by the protestants. On what other basis could these schedules be made up? On what other basis could they be maintained? The service sought is an auxiliary and supplemental service to the freight train service of the railroad and certainly the schedules should be made to conform to the railroad schedules. These schedules, the evidence showed, naturally will be changed from time to time as the schedules of the railroad are changed.

Protestants in the evidence state that the schedules of the applicant therefore are not in line with the needs of the public but that they will change their schedules to meet the demands of the railroad. The protestants further stated that they would be unable to move the freight of the Pennsylvania Railroad on their present schedules but would change their operation by putting on additional schedules and equipment to meet the demands of The Pennsylvania Railroad.

Under this condition of the record, the finding of the Examiner is very clear, plain and fair, that the protestants desire an opportunity to improve their service. Apparently the word which is unsatisfactory to the protestants is the word "improve." The applicant believes that the word "improve" is proper under the circumstances and under the evidence. Probably the word "change" would suit the protestants better than the word "improve." In any event we believe it to be a fair interpretation of the evidence that the protestants would necessarily have to improve their service, particularly as pertaining to the schedule to meet the scheduled requirements of The Pennsylvania Railroad.

Then comes another one of the blasts by the protestants at the Examiner when they say at the bottom of page 67 and the top of page 68 of the exceptions as follows:

"It is indicated that either the Examiner has failed to read the transcript and our brief or that he has for some reason we cannot fathom deliberately chosen to omit the most vital part of our

case from his finding and at the same time make another finding wholly contrary to the facts of record."

We believe this criticism answers itself.

Then, of course is the usual cry for reconsideration and a new hearing.

Specification No. 7

The protestants then claim an error in the following finding of the Examiner as set forth on Sheet 4, as follows:

"Upon consideration of all the evidence of record the Examiner concludes the record amply warrants the granting of the authority sought, subject to the conditions imposed by the Commission in Kansas City Southern Transport Company, Inc., Common Carrier Application, supra."

Under this specification are the usual complaints. They complain that the Examiner did not discuss protestants' evidence enough; that he omitted most of the important things the protestants developed. They complain that there was not enough discussion about the carriers already in the field and the service being rendered by them. They then complain that the substance of the finding is that the railroad can have its subsidiary start a new operation regardless.

Here and in many other places in the exceptions the objection is made that when a railroad is involved one measure is to be used and where ordinary motor carrier seeks an extension another measure is to be adopted. This claim of course is ridiculous. The protestants continually take the position that there is absolutely no difference of any kind between an application of this kind and an ordinary truck application. It is one thing for a truck company to start an entirely new operation as a common carrier serving the public generally, and an operation such as sought in the herein application wherein a very limited service is sought and that service being an improvement of an existing service now being rendered by the railroad. A great deal of the record and of the exceptions is taken up with nonsense of the protestants to the effect that there is no difference.

The protestants have taken the position repeatedly that there is no difference between these two types of operations, that there is no distinction between them. The Commission has had this same class of cases before it in dozens of other cases, and have gone into each and all of the contentions which are made herein by the protestants.

Protestants seem to think that some injustice is done to them which is irreparable by reason of the fact that the Commission

or the Examiner even make reference to these types of cases which have had the same questions before them.

The finding of the Examiner, we are sure, is imminently fair and proper and correct and in line with the other cases decided heretofore.

The protestants under this proposition make the same claim they have made repeatedly, at the hearing, in their briefs and in their exceptions, that one measure of proof is required of a railroad or its subsidiary and another measure of proof by an ordinary motor carrier. These claims are unfounded. Protestants seem to think that the mere fact that other motor carriers are in the field or part of the field that therefore that in itself precludes a railroad subsidiary from securing the type of authority sought in this application.

Specification No. 8

Under this specification protestants complain that the Examiner failed to give any weight whatsoever to the undisputed evidence that there are sufficient carriers already in the field presently furnishing the same sort of service to the Pere Marquette Railroad and who could also furnish such service to The Pennsylvania Railroad in this case.

Under this specification they complain that only one paragraph was allotted by the Examiner in his report describing the service of the protestants in this regard. How many paragraphs do they want? Apparently they desire a complete recital of all of the evidence in the case.

Protestants argue here and at many places that the mere fact that some of the carriers are now transporting freight for the Pere Marquette Railroad that it therefore follows that The Pennsylvania Railroad must also employ them, over the routes set forth in this particular application. There was no evidence in the record regarding what the service was being performed for the Pere Marquette except that it covered a few small routes. What the volume was was never disclosed. What the terms and conditions of the operations were were never disclosed, nor was the frequency of the service, nor the amount of tonnage involved disclosed. Certainly it is not conclusive in this particular hearing that the mere fact that some of these protestants in some places are serving the Pere Marquette should be conclusive that they also should impose their services upon The Pennsylvania Railroad covering the routes in question.

The protestants repeatedly claim that there are sufficient carriers already in the field. The undisputed evidence in this case

is that it would take several of these carriers to perform the service sought by the applicant.

Again the protestants claim "It is our position that the Commission in saying that a railroad or its subsidiary may be accorded the right to institute a new operation despite the existence of adequate transportation facilities is interpreting the statutes to mean that special privileges are to be accorded a railroad." This is another illustration of protestants' position that no certificate should be granted to the applicant simply because of the fact that there are other motor carriers in the field which are rendering an entirely different service, without any reference to other elements of testimony in the case.

Protestants then says, "In other words we might just as well have taken no part in the proceedings insofar as the Examiner's report is concerned." We are tempted to say "You have got something there, brother."

Specification No. 9

Under this specification protestants claim that the Examiner's finding "is erroneous wherein he says that in general the proposed authority is warranted" and despite the fact that the record was without any supporting evidence whatsoever going to show that the public convenience and necessity actually require the service. They again claim that protestants have been denied due process in many particulars.

Again protestants shout that there is no proof of public convenience and necessity.

They then make the claim "as even the applicant will be forced to admit the only thing to be found in the record to support any kind of an order is the claim and showing of the railroad that this may save them some operating time and possibly some expenses." At other places in the exceptions protestants criticize the findings and holding in the Kansas City Southern case and say that they have not read the record in that case. With these kinds of accusations and criticisms the conclusion is almost inevitable that the protestants have not read the record in the instant case, or prefer to ignore it.

Again they say that our testimony deals entirely with convenience to the railroad, which of course is incorrect.

They also state again that nobody testified that they actually need the proposed service. This of course, is likewise incorrect.

Again they criticize the Kansas City Southern case as not in accord with the law. How it is not in accord with the law they never state.

Then protestants claim that the facts in the instant case are not on a parallel with the facts in the Kansas City Southern case.

At different places in the exceptions they argue at length regarding this point. Of course, there is some difference in all cases. No two are ever exactly alike. As far as the main essentials are concerned this case is on all fours with dozens of other rail-truck cases granted by the Commission and it is beside the question to discuss at length such unfounded statements of protestants.

Then the complaint is made that the Commission in other cases has taken the position that it makes no difference whether this service is already available or not so long as the railroad simply indicates that it will make no use of it whatsoever. Protestants then state that this is the legal position taken by the railroad in this case and that we had warning throughout the hearing that they were going to rely on that precise doctrine.

More epithets are then thrown at the Examiner's findings by calling them "outrageous."

Reference is made by the same kind of argument regarding the Pere Marquette service being rendered.

Complaint is made by protestants that such grant would never be made to an ordinary common motor carrier without a showing of prodigious strength.

The Examiner is accused of having crossed off the protestants showing, etc.

The protestants then go again into the question of convenience and necessity and claim that all of the testimony of the railroad witnesses had been "exploded" by the protestants' proof.

Protestants make several claims regarding the testimony of applicant's 42 witnesses. These claims are unsupported by the testimony, extracts of which we have set forth at other portions of this reply.

Then for good measure another epithet is thrown at the railroad by charging them with "arrogantly" taking a certain position. They also charge the railroad with boasting.

Again the accusation is made of failure of proof by the applicant of convenience and necessity.

## Specification No. 10

Under this specification protestants claimed that "the grant is based on a discriminatory application of the statutes." No new argument is advanced under this heading by protestants. They charge that the Commission cannot say that the statute means one thing when a motor carrier is before it in another thing when a railroad is somewhere in the background and they charge that the Kansas City Southern and other cases, have by indirection said precisely that same thing.

The accusation is made that "If there is any other ground except an attack on the financial ability of the applicant it has not been called to our attention."

Again the accusation is made that the findings amount to a denial of protestants' rights under the statutes it amounts to a discriminatory application of the law.

The applicant is again charged with arrogance and protestants set up the silly proposition that the applicant believes and takes the position that an application of this kind cannot be defeated.

We believe all of these complaints are unfounded.

### Specification No. 11

Protestants under this specification complain that many errors of the Joint Board in admitting and rejecting the evidence noted and discussed in protestants' brief were not mentioned and no factual findings were made on any of the many important points thus raised in the trial of the proceedings.

These claims are likewise in error.

### Specification No. 12

Under this specification complaint is made of the failure of the proposed report to limit the authority to less than truckload traffic.

The record is replete with instances where protestants did not, could not or would not distinguish between less than truckload traffic and less than carload traffic. There is no such thing as less than truckload traffic as far as the railroad is concerned. Its movements are all carload or less than carload. Less than carload and less than truckload are not synonymous. Therefore the evidence was to the effect that The Pennsylvania Railroad desires to turn over to the applicant less than carload freight and not less than truckload freight. It could not turn over less than truckload freight to the applicant because it is bound and governed by its tariffs which only provide for carload and less than carload freight.

The protestants then complain that they are astonished that the Examiner did not so restrict the order.

Then the protestants make another unfounded accusation that "many of these statements were made because we were insisting that they were seeking authority to handle both kinds of traffic. The statements they made were directed toward lessening the opposition by minimizing the importance of what they sought."

In the next breath the claim is made that "beyond dispute they were seeking only the right to transport less than truckload traffic.

etc." This, of course, is inconsistent with the claim made immediately prior thereto.

In the applicant's testimony we outlined every one of the applications which the applicant has filed with the Commission in exactly this same type of service whereby certificates have been granted to the applicant covering the 25 routes now in operation. The evidence in every one of these cases has been exactly the same, that the only type of service sought regarding this phase of the subject is less than carload freight. No claim has ever been made that the applicant desires to transport for The Pennsylvania Railroad or that The Pennsylvania Railroad desires any other traffic transferred in this type of service than less than carload freight.

Then the Examiner is charged with using "weasel words" because he found that the service "shall be limited to service which is auxiliary to or supplemental of rail service." There is no question regarding these words; the Commission has used them in dozens of like orders and certificates. In this class of cases the Commission limits the applicant by various restrictions, and the restrictions are in the instant order, to service which is supplemental and auxiliary to that of the railroad. The usual five conditions as set forth in the Examiner's recommended order are the same as are included in the usual case of this type. In spite of the accusations made by protestants the service is kept within such restrictions.

Reply to Protestants' Heading "General Discussion"

Under this heading protestants again repeat all of their arguments under different arrangements.

At one point under this heading they set forth ten different numbered paragraphs which they contend are the only points made by the applicant. These same points are made at other places in the exceptions. Two or three of them we have discussed under separate headings at another place in this reply.

At the outset under this general discussion the accusation is made that the Commission has committed fundamental errors and in allowing itself to be misled into its present position.

We are not going to review again all of the objections raised under this heading because they have been raised several times under other parts of the exceptions.

The only point discussed under this heading which differs from other portions of the exceptions is the request for oral argument. The applicant has no objection to oral argument, but believes that under the circumstances it will serve no helpful purpose. Briefs

have been filed by the parties in interest on both sides; protestants have filed exceptions herein. The exceptions herein filed as a matter of fact amount to nothing but an additional brief on the part of protestants. They have had every opportunity to prepare their case and to present it by argument. Protestants had an unusual opportunity in the preparation of their case as they had several months time between the first and second hearings in which to prepare their case and after they had heard the applicant's testimony and had an opportunity to thoroughly comb the transcript covering applicant's evidence.

Reply to Protestants' Heading "Conclusion"

Under this heading many of the old arguments are repeated, including the request for oral argument. The only additional reasons given for wanting oral argument is, that counsel yearn to appear before the Commission and have the opportunity of being quizzed by members of the Commission and have the opportunity of counsel for protestants to equally quiz the membets of the Commission.

Reply to Separate Sheet Attached by Protestants to Exceptions

On this sheet, the typewritten sheet attached to the exceptions, Interstate Motor Freight System attempts to interpose certain elements which were not introduced in the evidence, and which are not in accord with the facts in the case.

The first statement made on this sheet is to the effect that Interstate Motor Freight System has spent many hundreds of thousands of dollars in starting, promoting and conducting its operations. There is no evidence regarding this fact in the record. Well, so has The Pennsylvania Railroad. So has the applicant spent a great deal of time, money and energy in developing a specialized business which thoroughly and completely understands this particular type and kind of business and has present routes of this type of operation for The Pennsylvania Railroad.

The next statement is to the effect that its main office is at Grand Rapids, Michigan, and that this is the heart of its system and is also one of the principal points the applicant proposes to serve. There is no such evidence as to where the heart of the protestant's system is. Unquestionably there is no doubt that it's main office is at Grand Rapids, Michigan. The Pennsylvania Railroad also has an office at Grand Rapids, Michigan, and Grand Rapids is the heart of the operation of The Pennsylvania Railroad in the State of Michiga., and will be an important point for the applicant in its operations under the proposed application if granted.

The next observation is that the proposed order if permitted to stand will therefore destroy much of the value of this protestant's investment at one stroke. If an investment representing years of work and thousands of dollars is to be destroyed on the strength of the sort of evidence presented in this case, then the public interest is certainly being served in a strange fashion. There is likewise no evidence in the record regarding these statements. There is no evidence of any kind whatsoever that that particular protestant will have any value destroyed. The only type of freight involved in the application is less than carload freight. The protestants in their evidence and in their exceptions several times state that they do not have any considerable amount of less than carload freight. The uncontradicted testimony therefore is to the effect that they have very little to lose if they lost all of the less than carload freight and there is nothing in the record to indicate that they are going to lose any of it.

If statements off the record are going to be considered in this case, then the Commission should take into consideration the long history of The Pennsylvania Railroad in its operations in the State of Michigan. It is a matter of common knowledge that with the advent of motor carriers the less than carload freight of the railroads has gradually been diverted from the rails to the trucks. Regardless of what the reasons may be, nevertheless this is a fact. The facts known to everybody are to the effect that many rail branches have been compelled to discontinue by reason of the institution of truck service, in various parts of the United States. By the type of service that is sought in the herein application, the railroads are trying to retain that portion of their less than carload freight which they have left.

The next statement is argumentative to the effect that since applicant's proposal strikes at the very heart of protestants' system it will undoubtedly result eventually in badly crippling protestants' ability to serve many of the points the railroad presently does not propose to serve. There is nothing in this case warranting any such conclusion. The last claim on this particular inserted sheet is that "the granting of this certificate, therefore, is in effect a gift with untold thousands at the expense of one of the pioneers in the motor carrier industry." This applicant and The Pennsylvania Railroad are not seeking any gifts. The railroad is not endeavoring to take away from anybody anything that belongs to them. They are not trying to enter any new fields. Their less than carload freight has constantly been taken away from them by competing motor carriers. The effect of the present application will enable the railroad to conserve that which already belongs to it. It is not seeking new business. It has the right to conserve that which now belongs to it. The Pennsylvania

Railroad has the fundamental belief that were it compelled to turn its less than carload business over to competing motor carriers they would lose it to these competing motor carriers and would still further suffer tremendous losses. Protestants are right in saying that effectively the service being performed by such companies as the subsidiary applicant is the same as if the service were being performed by the railroad itself. That is one of the main reasons why The Pennsylvania Railroad desires not to employ competing carriers. It will not lose its business in this manner but will be able to retain it.

## V. General Reply to Exceptions

It will now be our purpose to reply to the many objections and exceptions raised which are scattered and duplicated throughout the exceptions. We will also cite authorities to sustain our essential positions.

First of all, applicant submits under the law The Pennsylvania Railroad has the right to select its own agent in the performance of the agency involved in these proceedings, and that the Commission is without jurisdiction to compel it to deal with any agent other than its own choosing. We will discuss the first of these propositions first, and the second proposition last.

In the case of the Saint Louis Drayage v. Louisville and N. R. R., 65 Fed. 39, decided in 1894, involving an action to recover damages for unjust discrimination, based on the fact that the railroad, by contract, absorbed certain drayage charges of a drayage company competing with plaintiff in respect of traffic between East Saint Louis and Saint Louis, and refused to enter into a similar arrangement with the plaintiff. The Court held that the railroad could select its own agents or its own connecting carriers, at common law, to perform such a service and cited as authority A. P. & S. Railroad v. D. & O. Railroad, 110 U. S. 667. The Court said further, however, that:

"The results cannot be different whether the contract between the transfer company and the defendant be regarded as a connecting line between two independent carriers engaged in interstate commerce or whether it be regarded as a selection by the railroad company of the transfer company as an agency for the delivery of defendant's freight between East Saint Louis and the city of Saint Louis. The law is that the plaintiff cannot recover."

The Interstate Commerce Act has changed the common law to a considerable extent as to the connecting rail carriers, but there is no such provision in the Motor Carrier Act with respect to connecting truck carriers or connecting rail and truck carriers.

The foregoing decision and quotation were quoted as authority by the Interstate Commerce Commission in a very important case known as Transfer of Freight Within Saint Louis and East Saint Louis by Dray and Truck for and on behalf of railroads, 155 I. C. C. 129, at which this particular subject was discussed at pages 141 to 144. On page 143, in answer to claim by a group of shippers that they had not only the right to adequate service but also might dictate the means employed to effectuate it, the Commission had the following to say:

"We cannot agree with this concept of the law. The primary duty of the carrier is to furnish reasonable and adequate service and facilities, and that done, it has the right to choose its methods and its agencies."

This has always been the position of the Commission, and the Saint Louis case was quoted with approval as authority in the decision handed down in 1934 in the case of Motor Truck Club of Massachusetts, Inc., v. Boston and Maine Railroad, 206 I. C. C. 18, at page 21, of which the Commission had the following to say:

"One of the complainant's objections to defendant's operation of its store door service is that it employs only one truck man at all points except Boston. Defendant's liability as a carrier under this service extends to and from the store door. It is entitled, as a matter of law, to select its own agent for the performance of the store door service (citing the Saint Louis case) and in its exceptions to the Examiner's tentative report complainant recognizes this right of the defendant."

In the Louisville and Nashville case, 30 M. C. C. 121, one of the group in question, the American Trucking Association and certain motor carrier competitors, attempted to prove that the independent motor carriers could render not only a more efficient service, but a more economical service in lieu of the express agency which the railroad had selected as its agent. Three different plans were set forth under which this might be done, as more fully explained in the opinion of Mr. Eastman. After considering these plans in detail and the objection to the railroad to the adoption of any of them, it was held by the Commission that the Railroad had the right to select a carrier for the performance of the service, notwithstanding the availability of the existing truck carriers to perform such service.

Referring back to the Supreme Court decision first hereinabove cited, the Commission and Division 5 have separately stated that the Commission has no authority to compel joint through routes or joint through rates between railroad and truck companies, but that any such arrangements are purely matters of voluntary agreement.

In our present case, the applicant feels that there is conclusive authority for it being chosen as the agent of The Pennsylvania Railroad. The record herein justifies this position. Protestants seriously objected at all times at the hearing, to the reasons being kept out of the evidence and partially succeeded, although erroneously and over applicant's objections. However, the record is complete with evidence justifying the choice of applicant as the agent to perform the service sought.

## Kansas City Southern Case

Protestants have a great deal to say regarding the Kansas City Southern case. First there is the objection that the Examiner has indicated that the prior decisions of the Commission are completely in point and that these decisions govern his findings. It is fundamental that the Examiner should follow the adjudicated decisions of the Commission and wherever decisions are found which are completely in point they naturally should be cited and followed. In this particular instance the Examiner has cited one of the former cases of the applicant, which was entirely; in our judgment, on all fours, parallel.

The protestants object that the Kansas City Southern Transportation Company, Inc., common carrier application, 28 M. C. C. 5, decision is not parallel in all instances. A great many references are made to this decision by protestants, and there is an attempt made upon their part to analyze each and all of the various elements of evidence contained in the Kansas City Southern case in an attempt to show that none of the points in the two cases are parallel. We have pointed out hereinbefore that naturally there are no two cases which are exactly alike in every minute detail, just as there are no two grains of sand exactly alike. However, within the bounds of reason it is our judgment that the Examiner was eminently correct in citing this case and holding that it was exactly the same type and kind of case, with a background of evidence the same.

Protestants at various portions of their exceptions scathingly attack the Examiner because he has cited the Kansas City Southern case as authority, and charge him with having made up his mind in advance. This, of course, we think is unfair and unjust.

At various points in the exceptions protestants make the statement that the facts of record are different in the two cases, but all we have stated is the bare statement in the exceptions to that effect. The reasoning of the Examiner is referred to as being falacious, as doing violence to the facts of record, and in violence to all reason and logic.

The Examiner is charged with being unfamiliar with the facts in the Kansas City Southern case and having indicated that it was hopeless to expect the Commission to reach any conclusion differing from that case, regardless of what the factual situation might be.

For instance, there is the charge that in the Kansas City Southern case there was to be a complete substitution of truck service for local or way car service, whereas in the instant case such would not be the service sought. We will discuss in another portion of this reply this particular situation, which is entirely contrary to the claim made by protestants.

At least the writer of the exceptions was quite frank where he said, in several cases, that he had not read the transcript in the Kansas City Southern case. This is quite evident from the objections that are raised in the exceptions.

It is the opinion of applicant that the two Kansas City Southern cases are exactly in point with the instant case, and that the Examiner acted justly and properly in making reference to these cases, as well as to the former case of the applicant wherein it was granted a certificate under similar circumstances.

We will from time to time hereinafter refer to the Kansas City Southern cases, and therefore will make no further comment at this time.

## What Railroad Proof Necessary

The protestants charge that "in the present case the applicant has justified its request for authority by merely showing that it is willing to do business for the railroad which refused point blank to have any dealings with any carrier not owned by itself." Then the Commission is charged with using no reasoning in any of these cases in justifying its conclusion in holding that a railroad or its subsidiaries should be granted a certificate. The protestants seem to think that this type of case is exactly like any other type of motor carrier case and that strictly speaking it is absolutely new operation. One of the many challenges in the exceptions is made to this point. The Commission is charged with falaciously holding in all other cases of this type that where a motor carrier is not a subsidiary of the railroad it has no chance to secure any such authority by reason of the fact alone that the railroad "lurks in the background."

On page 90 of the exceptions is the charge "it means that in order that this may be justified it is necessary to conclude that no protestant or group of protestants can ever defeat a request for authority by the railroad and its subsidiaries under any circumstances."

The applicant herein is only asking that it be heard on the same basis that each and all of the other cases of this same type have been heard. There are very definite things which must be proved in these cases, and the applicant has met these requirements with the proper evidence. The mere unfounded criticisms and scathing denunciations of protestants do not change the situation.

## Railroad Testimony

Protestants seem to take the position that the mere fact that a witness is employed as a pick-up and delivery agent for The Pennsylvania Railroad is reason for completely disregarding his testimony on the grounds that he is biased and ask that the testimony of Edward F. Dinkle of Conklin, Mich., be disregarded. We have set out a portion of this witness' testimony in the earlier part of this reply, wherein it will be seen that the man was a very fair and honorable witness, who is not only a pick-up and delivery agent for The Pennsylvania Railroad, but for the other railroads entering his town. Of course, protestants do not want his testimony considered because it was decidedly damaging to them. We will not set it forth again at this point because it is already set out at an earlier place in this reply.

If the contention of protestants is the correct measure of the admissability of testimony, or the weight to be given to witnesses then it should therefore follow that the mere fact that this witness is employed by The Pennsylvania Railroad, and that therefore his testimony should be disregarded, it also follows that the testimony of each and all of the representatives of the carriers on the protestants side of this case be completely disregarded.

It is amusing to note that after protestants ask that because of bias this man should be disqualified in anything that he says, then they go on to take advantage of what they think to be a portion of his evidence which is favorable to them.

Again protestants claim that "the railroad is the real party in interest in our case, just as it was in the Kansas City Southern case, and this fact should make the Commission look with grave doubt and suspicion on any claim made by the railroad to the effect that it could not use any independent motor carrier service." Protestants argue both hot and cold on this proposition in their exceptions. They are correct in stating that the conditions are the same in the Kansas City Southern case as they are in the instant case. No one is more vitally interested in this case than The Pennsylvania Railroad and rightfully. All of the transportation involved is Pennsylvania Railroad transportation, and one of its main reasons for desiring its own subsidiary to handle this trans-

portation is that it desires to keep this transportation and not have it taken away from it by some independent motor carrier operator.

### Applicant's Shipper Witnesses

Protestants advance the proposition that since only four of applicant's shippers were sworn and examined on the stand, that it was only necessary to make reference to the testimony of these particular four witnesses. Protestants then state that in their analysis of the evidence they would therefore only refer briefly to the statements made by these four witnesses. And briefly it was.

Without repetition at this particular point, we again refer to the extracts of the evidence which we have set forth in the early part of this reply wherein it was shown that each and every one of the four shipper witnesses who testified on the stand for the applicant testified to convenience and necessity and each and every one of the stipulations of applicant's 38 witnesses also testified that the convenience and necessity would be served by the granting of the certificate as far as they were concerned. Without repeating here we again refer to those extracts of evidence herein and particularly to the agreed cross-examination of these thirty-eight witnesses.

### Applicant's Proposed Service Will Serve a Public Need and be in the Public Interest

It is the vigorous contention of applicant that convenience and necessity in this type of case is exactly the same as in all other types of motor carrier cases, and that there must be shown a complete inadequacy of available service upon the part of existing motor carriers in the territory before there will be a justification for granting an application such as is herein sought. The contention of protestants is not the correct statement of the law. First of all, there is the responsibility of the applicant to show that it is fit, willing and able to properly perform the proposed service, and to conform to the provisions of the Motor Carrier Act. There is no contention that applicant is not fit, willing and able, nor has any such point been made in the exceptions. But once this proposition is established, then it is incumbent upon the applicant to show that the proposed service will serve a public need and be in the public interest.

On this proposition we first cite two quotations from the case of Kansas City Southern Transport Company, Inc., common carrier application, 10 M. C. C. 221 (234), wherein Division 5 said:

"Under Section 207 (a), we cannot grant the certificate desired, unless we find—

that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity:

The record clearly justifies the first part of this finding. The only substantial question is whether it has been shown that the proposed service 'is or will be required by the present or future public convenience and necessity.' In Pan-American Bus Line operation, 1 M. C. C. 190, 203, we said:

Perhaps the best interpretation of the purpose underlying the 'public convenience and necessity' provisions was by the Supreme Court in Texas & N. O. R. Co. v. Northside Belt Ry. Co., 275 U. S. 475, 479, as follows:

'The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carriers operating in interstate commerce a competing line not required in the public interest.'

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

Applicant also cites New York Central S. Corp. v. United States, 287 U. S. 12, wherein the court said:

"The public interest is served by economy and efficiency in operation. * * * the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. * * *" (P. 234.)

In Rock Island Motor Transit Company, common carrier application, 21 M. C. C. 513 (518–519), Division 5 said:

"We are of the opinion that the proposed coordinated service will serve a useful public purpose, responsive to a public demand or need; that such service through the voluntary cooperation of all or some of the protesting motor carriers is not here practicable; and that the useful public purpose which the proposed new opera-

tion will serve cannot be served as well by existing lines or carriers."

In Missouri Pacific Freight Transport Company, 25 M. C. C. 117, in a case where the operating rights of Alvin F. Steele were being purchased, Division 5 said:

"There is substantial evidence showing herein the public interest will be promoted by coordinated rail-truck service between Waco and Marlin similar in character to that hereinbefore discussed in connection with No. MC-F-718, the expedited service which would result and the economics which the railroad would realize" (p. 119).

In The Texas and Pacific Motor Transport Company, extension of operations, 33 M. C. C. 38, at page 38, Division 5 said:

"The substitution of the more efficient motor vehicle service to and from these points for the less efficient rail service, both in its direct and indirect effect, is in the public interest."

In the case of The Willett Company of Indiana, Inc., extension of operations into Illinois, Indiana and Kentucky, 21 M. C. C. 405, at page 409, Division 5 said:

"We are of the opinion that the present and proposed coordinated service here in question does and will serve a useful public purpose, that such purpose through the voluntary cooperation of all or one of the protesting motor carriers is not here practicable, and that the useful public service which the present and proposed operations do and will serve cannot be served by other existing lines or carriers."

The evidence in the instant case is to the effect that the service being rendered over applicant's 25 routes now in operation is exactly the same as the proposed service. In fact the case just quoted, of the applicant, and the instant case, are parallel in their entirety. Therefore the reasons are exactly applicable.

We desire now to refer to another case which, in our judgment, is more parallel to the applicant's operation than the ordinary operation. The Indiana Railroad for a great many years has operated a line of interurban railroads primarily within the State of Indiana. By reason of the fact that certain portions of its operations were solely within the State of Indiana, they secured a registration certificate from the Commission, and at a later date when securing authority into additional States, filed an application with the Commission for the purpose of receiving a certificate of convenience and necessity and the Commission granted it. In the Indiana Railroad cases, the interurban company was abandoning its freight operations by rail and substituting truck service in its entirety.

At page 178 in Indiana Railroad, extension of operations, Fort Wayne by the way of Muncie, 27 M. C. C. 176, Division 5 said:

"Similarly for the reasons stated at length by Division 5 in the report in that case, we believe that applicant should be permitted to substitute motor carrier service for its present rail service and thereby continue to handle the traffic of shippers it has served for long periods of time. Applicant's retention of its present traffic admittedly can have no effect on existing motor carriers between the same points, and any future diversion of traffic, either to applicant or from the applicant to other carriers will be influenced by the best service available to the shippers. Under such circumstances it cannot be said that competition fostering such improved service is detrimental to the public interest."

In Dixie Ohio Express Company, extension of operations, 30 M. C. C. 291, at page 295, the Commission said:

In New York Central Securities Co. v. United States, 287 U. S. 12, the Supreme Court, in construing the term "public interest" as used in what was formerly Section 5 (2) of the Interstate Commerce Act relating to acquisitions of control, said:

Appellant insists that the delegation of authority to the commission is invalid because the stated criterion is uncertain. That criterion is the "public interest." It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. * * * the term "public interest" as thus used is not a concept without ascertainable criteria, but had direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority concerned. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provision with respect to reasonableness of rates, to discrimination and to the issue of certificates of public convenience and necessity. [Emphasis supplied.]

The same effect was held in Louisiana, Arkansas and Texas Railway Company, 22 M. C. C. 213, at pages 216 and 217, wherein Division 5 said:

'We are of the opinion that the proposed coordinated service here in question would serve the useful public purposes responsive to a public demand or need; that such service through voluntary cooperation of all or some of the protesting motor carriers is not here practicable; and that the useful public purpose which the

proposed operations will serve cannot be served as well by other existing lines or carriers."

In Missouri Pacific Railroad Company, and Missouri Pacific Railroad Corporation in Nebraska, 22 M. C. C. 321, at page 331, Division 5 said:

"The proposed motor services are not competitive with applicant's rail services, and there is no showing that they in any instance invade the territories of any other rail carriers. They may therefore be classified as 'approved operations' as defined in Pennsylvania Truck Lines, Inc.—Control—Barker Motor Freight, 5 M. C. C. 9. It is clear that they have resulted in substantial operating economies and that they have proved to be of material advantage to the public since such services are strictly confined to rail points now served by applicant, their continuance will not unduly restrain competition."

In Pacific Motor Trucking Company, common carrier application, 21 M. C. C. 761, Division 5 said at pages 763–764:

The points in question are admittedly served by other motor carriers, and protestants on exceptions contend that public convenience and necessity therefore do not require the proposed operation. While adequate motor-carrier service, as such, is no doubt available, we have somewhat consistently refused to compel rail carriers to make their coordinate efforts dependent on competing motor carriers. It is clear that applicant's proposed service will expedite deliveries of less-than-carload shipments now moving by rail and will in some instances supply pick-up and delivery service not now available. It will also result in an improved service with respect to carload traffic by permitting a better adaptation of remaining train schedules to its needs. In addition some economies in operating expenses will be effected. There is no question that the proposed rail-truck coordinated service is in the public interest. We have in several instances granted similar authority to other carriers. Illinois Central R. Co., Common Carrier application, 12 M. C. C. 485, Kansas City S. Transport Co., Inc., Com. Car. Application, 10 M. C. C. 221, Seaboard A. L. Ry. Co., M. Operation—Gaston—Garnett, S. C., 17 M. C. C. 413. (Pages 763–764.)

To the same effect is Seaboard Air Line Railway Company, extension of operations, 21 M. C. C. 773, wherein Division 5 said:

"There seems to be little question that the proposed rail-truck coordinated service is in the public interest,"

and again on the same page:

"We find that the present and future public convenience and necessity require operation by applicant."

In Chicago and Northwestern Railway Company, extension of operations, 31 M. C. C. 455, at page 458, Division 5 said:

Nor do we believe that the public interest could be served as well through the utilization of the service of existing motor carriers. While a large number of motor carriers operate in the territory, none serves all of the points involved. Several of the principal motor carriers made offers to perform the motor vehicle portion of the coordinated service. Applicant regards any such plan of coordination with independent motor carriers as impracticable. There are several reasons, and it is evident that great difficulties would be encountered. Coordinated service between carriers by rail and carriers by motor vehicle could only be accomplished through the medium of through routes and joint rates, and we have no power to require their establishment. Hence any such plan must be dependent upon voluntary cooperation. On brief, protestants assert that Union Transfer Company, of Omaha, Holdcroft Transportation Company, of Sioux City, and On-Time Transfer Company, of Omaha, serve all of the points involved and that a number of other carriers serve various segments of the proposed routes. The record shows, however, that the three motor carriers named neither individually nor collectively serve all the points involved, and that at least 25 per cent of the stations are not so served. (P. 458.)

New Operation

In Kansas City Southern Transport Company, Inc., 10 M. C. C. 221, this same type of service, at page 235, was held by Division 5 to be a new form of service, and that it will serve a useful public purpose responsive to a public demand or need. What is meant by a "new form of service" is that it is distinct and separate from the old types of service, namely an all rail service or an all motor carrier service. In the sense that it is part by rail and part by motor carrier it is a new form of service.

This was clearly stated at page 235 in the last named decision, as follows:

"Moreover, it is clear that this coordinated rail-motor service will be a new form of service utilizing both forms of transportation to advantage and differing from the service given by the railway alone or by the competing motor carriers alone. That Congress contemplated such coordination is shown by section 202,

(a) of the Act, which declares it to be the policy of Congress, among other things, to 'improve the relations between and coordinate transportation by, and regulation of, motor carriers and other carriers.'"

In another sense this proposed service is not a new operation but is merely an improvement of a service already being performed. This was made clear in Texas and Pacific Motor Transport Company, extension of operations, 30 M. C. C. 465, at page 467, wherein Division 5 said:

"The proposed extension is not a new operation, but merely an improvement of a service already performed by applicant in its present operations. The bulk of the traffic to benefit from the improvement is already being handled by applicant. If the improved service should attract additional traffic by applicant that fact should not deprive the public of the substantial advantages that would come from more expeditious service. The proposed changes would not deprive any community of service now being rendered and would not result in any reduction of employees. The changes would have the desirable result of more economical operations by applicant. The Joint Board is of the opinion that the public interest would be served by the proposed extension."

In Louisiana and Arkansas and Texas Railway Company, 22 M. C. C. 213, Division 5 said:

"The coordinated rail-truck service differs from the service given by the railway alone or by competing motor carriers alone. It is a new form of service utilizing both rail and motor vehicle transportation to advantage in such a way as to render a merchandise service which is much less expensive and at the same time more expeditious and more convenient and generally satisfactory to the public served. That these results can be achieved the record leaves no doubt."

The last case quoted is exactly like the instant case.

In Atlantic Coast Line Railroad Company, extension of operations, 30 M. C. C. 490, Division 5 at page 492 said:

We are also of the opinion that public convenience and necessity require the proposed service. What applicant is seeking is not to enter a new field of service but to substitute a more economical and flexible service. Applicant has been and is transporting the traffic in question by rail, and it is under obligation to continue to do so. The proposed coordinated rail-truck service will result in a saving and a more efficient handling of merchandise traffic as well as in an improvement in the handling of carload traffic. Protestants assert that Thurston Motor Lines serve all of the points involved, and it may be, as contended, that existing motor-carrier service is adequate, but one competitive carrier or class of

carriers has no vested right in the continuation by another of an inefficient method of operation. Rather, we believe it to be the policy of Congress and the proper function of this Commission to foster any form of progress in transportation which will serve the public interest. (P. 492.)

In Missouri Pacific Railroad Company, extension of operations, 19 M. C. C. 605, at page 606, Division 5, said:

"The primary purpose of the authority sought is to afford an improved service to the public along the respective routes through the medium of a coordinated rail-truck service * * * In addition this will permit faster movement of carload freight moving in the same train to local points as well as other economies in rail operation."

In Seaboard Air Line Railway Company, 17 M. C. C. 413, at page 432, Division 5 said:

In Illinois Central R. Co. Common Carrier Application, 12 M. C. C. 485, we granted authority, similar to that sought by applicants herein, to the Illinois Central Railroad Company authorizing motor-vehicle service between certain stations on the line of that carrier in Illinois. We said there, at page 491:

"The inauguration of the coordinated operations here proposed will result in improved service on merchandise as well as carload traffic. * * * The plan proposed by applicant will result in a new type of service, utilizing both forms of transportation to advantage, and differing from the service given by the railroad alone or by competing motor carriers alone.' That Congress contemplated such coordination is shown by section 202 (a) of the Act, which declares it to be, among other things, the policy of Congress to 'improve the relations between, and coordinate transportation by a regulation of, motor carriers and other carriers.' Further, section 213 (a) (1) permits a railroad to acquire a motor-carrier operation provided we find 'that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.'" (P. 432.)

In the instant case protestants deny and find fault with these statements in cases quoted and deny that in the instant case, the service in question is such a new service. Protestants seem to think that the only thing claimed as a distinguishing factor by the applicant is that the service is being performed by a railroad. This of course is not correct. It is a new type or form of service regardless of who performs the service. In some instances the railroads are performing the service and in some instances trucklines are performing the services *and in some instances*.

*trucklines are performing the services*, but nevertheless it is a new type as described and discussed in these decisions which we have quoted.

The decisions are very clear regarding the service being a new type and form and therefore further argument is not necessary.

## Unity of Control to Expedite

It is fundamental in cases of this type that in order for the railroad to completely expedite the movement of freight to the best advantage of the shipping and receiving public, it is necessary to have unity of interest between those performing the rail and the motor vehicle portions of the haul, and that the entire operation be under common management and control.

In a case very similar to the instant case, Division 5 decided this very proposition. In Chicago and Northwestern Railway Company, extension of operations, 31 M. C. C. 455, page 458, 459, Division 5 said:

"In addition, it would be necessary for applicant to make arrangements not with one carrier, but with several, each performing a more or less disjointed part of the service, and it would be necessary for some one or more of protestants to obtain authority to serve stations which they do not now serve. The traffic will involve movements partly by rail and partly by motor vehicle in line-haul operations. Applicant urges that, in order to accomplish satisfactory coordination and attain the desired flexibility of rail-truck operation, it is essential that a unity of interest exist between those performing the rail and the motor vehicle portions of the haul, and that the entire operation be under common management and control. In view of the close adjustment of schedules and interchange arrangements which good and dependable service requires, as well as the use of applicant's station facilities and the service of its employees, we believe that applicant has sound grounds for this contention. Protestants also serve numerous points in the general territory not served by the railway. They would find it difficult to adjust their schedules to meet the needs of coordination with the rail service without disrupting their service to the off-rail points. In addition, protestants serve important rail points beyond those here involved, and applicant would find it necessary to divide control over and responsibility for less-than-carload service in the affected area with motor carriers which would continue to afford a competing all-motor service not only in the territory but on long-haul traffic to and from points beyond." (Pages 458–459.)

In Pacific Motor Trucking Company, purchase 25 M. C. C. 37, wherein Pacific was purchasing Vandergriff and Duda Lines,

Division 5 held that such operation would not unduly restrain competition and that the conditions in Section 213 would be fulfilled. On pages 39 and 40, Division 5 in part said:

"We find that purchase * * * will promote the public interest by enabling the Southern Pacific Company to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition and that the conditions of section 213 have been or will be fulfilled."

## Adequate Motor Truck Service Available

Protestants take the position that practically the only issue involved is the question as to whether or not there is available motor carrier service available by independent truck operators. They argue at length that if there is partial or complete available independent motor carrier service over the routes in question that the Commission is powerless to grant a certificate to a subsidiary under circumstances such as we have in the instant case.

This contention of the protestants is definitely decided contrary to the contention of the protestants in practically every one of the cases we are citing in this reply, and need not be replied to in detail.

This same contention was made in Kansas City Southern Transport Company, Inc., 10 M. C. C. 221, at page 235, Division 5 stated the following:

"Is it necessary, however, that applicant be given the desired certificate in order to accomplish this purpose, or can it be 'served as well by existing lines or carriers'? As shown in appendix C, a number of independent motor carriers now afford service to and from most of the points applicant proposes to serve, and between some of the points they maintain several schedules each day. These motor carriers are protestants and they contend that whatever cordination of rail and motor service may be desirable can be accomplished by the railway through arrangements with them and utilization of their facilities, or, at all events, that this method of attaining the result sought should be tried before applicant is permitted to establish a new service.

"The railway regards any such plan of coordination with independent motor carriers as impracticable. It goes so far, indeed, as to suggest that if it contemplated retirement from the handling of merchandise traffic, it could do so more gracefully and at less expense than by entering into joint arrangements with parallel competing truck lines, from which the railway is convinced 'it could reasonably expect no bona fide coordination or cooperation'." (Page 235.)

Another case in point is Rock Island Motor Transit Company, 21 M. C. C. 513. At pages 518 and 519, Division 5 said:

"In addition it is urged that in order to accomplish satisfactory coordination of rail-truck operations, it is essential that rail and truck lines have a unity of interest and be under a common management and control. In view of the close adjustment of schedules and interchange arrangements which good and dependable service would require as well as the contemplated use of facilities, we believe the railway has sound grounds for its contention. We are of the opinion that the proposed coordinated service will serve a useful public purpose responsive to a public demand or need; but such service through the voluntary cooperation of all or some of the protesting carriers is not here practicable; and that the useful public purpose which the proposed new operation will serve cannot be served as well by existing lines or carriers."

A similar situation arose in Missouri Pacific Railroad Company, extension of operations, 20 M. C. C. 563. At page 566, Division 5 said:

"Certain protestant motor carriers submitted evidence to show that they already serve most of the territory herein involved and are ready and able to provide all of the facilities necessary to handle all the traffic available. They fear that the proposed services of applicant will have a detrimental effect on their existing operations. No one of the protestants serves all the points on the rail lines, and certain points appear to have no truck service. Applicant seeks only to handle more expeditiously the traffic having a prior or subsequent movement by rail and only intends handling same between stations on the rail line of applicant. It does not appear that the competitive situation with respect to this traffic will be seriously affected or that the traffic now handled by protestants in all-truck movement will be materially changed by the granting of the application." (Page 566.)

Again we refer to one of the Indiana Railroad cases wherein motor truck service was substituted in its entirety for the transportation of freight in interurban cars. We quote at length from page 77 of one of these cases, namely, Indiana Railroad, extension, 21 M. C. C. 73, as follows:

"Protestants contend that the evidence does not disclose that existing motor-carrier service is inadequate and that the application should therefore be denied. We have in prior decisions stated that existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically as against any person seeking to enter the field. We do not believe, however, that the granting of the authority sought herein is fundamentally in conflict with that principle. In the first place, the evidence discloses that there is a need for a continuance of service to Clayton, Pecksburg, Amo, Coatsville, and Fillmore, which is not met by any existing motor

carrier. As to other points involved herein, applicant is not a newcomer in the field in the usual sense since its facilities will be utilized largely by shippers who have long used and depended upon its service. The authorization of a substitute motor service will not materially intensify the competition which now exists. While it may be conceded that the advent of applicant into the motor-carrier field may divert some traffic from these carriers, the contemporaneous abandonment of rail service will no doubt also contribute to them some new business, since it is inconceivable that applicant could hold all its former customers. In the end any diversion of traffic one way or the other can most logically be attributed to a superior service. It cannot be said that competition fostering such improved service is detrimental to the public interest.

"Moreover, it is evident that the abandonment of rail service herein will result in a need by shippers for additional motor-carrier transportation which must be supplied by existing motor carriers or by a substituted motor-carrier operation by the former rail carrier. Under the circumstances we consider it entirely equitable to authorize the substituted service rather than to deny the application in order that existing motor carriers may expand." (P. 77.)

## Economy of Operation

Protestants argue at length that about the only thing the applicant has shown in the nature of a reason why the application should be granted is the benefit to The Pennsylvania Railroad, and cite the instance of economy to the railroad. At the hearing the protestants bitterly fought the introduction of this type of evidence, and yet in almost every one of the rail-truck cases before the Commission this same type of evidence has been introduced by the applicant and has been received and commented on favorably by the Commission or the Division in writing the order.

This same contention of protestants was made in Kansas City Southern Transport Company, Inc., 28 M. C. C. 5; the Commission, at page 10, said:

"This is the reason for coordinating truck service with the rail service, and, as we have found (and as Division 5 also found), public convenience and necessity require the increased economy and efficiency which will result from such substituted use of trucks. By the same reasoning, however, public convenience and necessity require the substitution of trucks for way-freight train service regardless of whether there is a prior or subsequent movement by rail. Such substitution is a part of the plan of coordination, and unless it can be accomplished, the full benefits in in-

creased economy and efficiency which the public interest demands cannot be secured." (P. 10.)

The same thing was stated in the other Kansas City Southern Transport Company, Inc., case, 10 M. C. C. 221. We quote from page 234 of this case:

"Applicant has referred us to a long line of cases decided under Part I of the act, in which we held in substance that effecting economies and reduction in cost of transportation and increasing efficiency of transportation service of a particular railroad inure to the benefit of the general public and justify the issuance of a certificate of public convenience and necessity. Applicant cites Texas v. United States, 292 U. S. 522, wherein the court, after stating that it had found in previous cases that the Transportation Act, 1920, set up a new policy "seeking to insure adequate transportation service," said:

* * * "It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public." (P. 234.)

In Rock Island Motor Transit Company, 21 M. C. C. 513, there were many of the objections discussed which have been raised in the instant case, including that of economy. We quote from page 518 from this case as follows:

"There are a number of motor carriers operating several day and night schedules between Fort Worth and Dallas. At the hearing, counsel for four of them expressed their willingness to enter into interchange arrangements and transport the railway less-than-carload freight between these points on an agreed division of revenue or on a revenue-prorate basis. Their counsel contends that there is not sufficient tonnage of less-than-carload freight moving over the Gulf between Fort Worth and Dallas to justify the proposed service by applicant and that a coordinated rail-truck service through the use of existing motor carriers would meet the needs of the shipping public. On the other hand, the railway contends that any such plan of coordination with independent motor carriers would be impracticable; that it would not be in the interest of the railway to disclose the names of shippers to competing carriers, which would happen in the event of interchange, and that in the event of loss or damage to freight it would be to the benefit of the shipping public to look to one responsibility such as would be represented by applicant and the railway, rather than to different common carriers. It is also contended that, if applicant were permitted to operate to and from the intermediate points only, neither applicant nor the railway could operate economically because of the fact that there would be no saving in car-miles operated and the further fact that the tonnage to and from intermediate points is very light." (P. 518.)

The same kind of a contention was made in Missouri Pacific Railroad Company, extension of operations, 20 M. C. C. 563. On page 565, Division 5 said:

"We have decided in Kansas City Southern Transport Company, Inc., 10 M. C. C. 221 and in Texas & Pacific Motor Transport Company, 10 M. C. C. 525, and in other cases that operations similar to those proposed by applicant will be economical, will improve the railroad service, are demanded by the public interest and should be approved and encouraged."

Again in Missouri Pacific Freight Transport Company, purchase, 25 M. C. C. 117, at page 119, Division 5 said:

"There is substantial evidence showing wherein the public interest will be promoted by coordinated and rail-truck service between Waco and Milan similar in character to that hereinafter discussed in connection with MC-F-718, the expedited service which would result, and the economies which the railroad would realize."

In J. H. Axley, extension of operations, 30 M. C. C. 387, at pages 389-390, Division 5 said:

"It is clear that the benefits to be derived from applicant's proposed operation will accrue directly to applicant, but indirectly the public will benefit in that the mountainous route used at present would be avoided and shipments would be delivered more expeditiously. By the use of the proposed route applicant would also be enabled to operate more economically and should be able to afford a more dependable and efficient service."

In the instant case the evidence is conclusive that the economies are real and it is clear that they can be achieved. In one of the former cases of applicant, the same objections were made to this class of testimony and at page 408 in the case of The Willett Company of Indiana, Inc., extension of operations, 21 M. C. C. 405, Division 5 said:

"The coordinated rail-truck service differs from the service given by the railroad alone or by competing motor carriers alone. It is a new form of service utilizing both rail and motor vehicle transportation to advantage and in such a way as to render a merchandise service which is much less expensive and at the same time more expeditious and more convenient and generally satisfactory to the public served. Applicant has been performing such service in conjunction with the railroad over several of the routes herein requested since prior to October 15, 1935. That the benefits to be derived from such coordinated service have been and can be achieved is clear."

To the same purport is Dixie Ohio Express Company, extension of operations, 30 M. C. C. 291, we quote from page 295-296 wherein the Commission said:

"If, as held in these decisions, contributions to 'economy and efficiency of operation,' to the 'best use of transportation facilities,' and to 'the relief of interstate commerce from burdensome outlays,' are criteria of thing in the public interest, then clearly such contributions are evidence of public convenience and necessity in cases such as this. Actually, there is nothing novel about this view. It has underlain to a greater or lesser extent a number of our past decisions. Moreover it is the present national transportation policy, 'to promote safe, adequate, economical, and efficient service.'

"We are also convinced that the use of a reasonably direct and suitable route which avoids the necessity of burdensome outlays, delays, breakage, and annoyance to shippers, incidental to compliance with the regulations of a particular State, is a legitimate operating economy which we should foster and encourage and of the same character as the avoidance of a toll bridge, or of a mountainous route in favor of a level one." (Pages 295–296.)

To the same extent are:

Missouri Pacific Railroad Company and Missouri Pacific Corporation in Nebraska, 22 M. C. C. 321 (page 331);

Louisiana, Arkansas and Texas Railway Company, Common Carrier application, 22 M. C. C. 213 (216).

There are many other decisions holding this same thing to the effect that evidence pertaining to economies in operation are admissible in evidence and are highly considered by the Commission.

## Improved Service and Diversion of Traffic

The purpose of the applicant and of The Pennsylvania Railroad Company, as stated by applicant's witnesses, among other things is the improvement of the service so as to retain the less than carload business, which The Pennsylvania Railroad now enjoys. It is a matter of common knowledge that originally the railroads had all the less than carload business and that gradually through the years with the advent of the motor carrier a very large percentage of this traffic has been diverted from the rails to the motor carriers. It is the purpose of The Pennsylvania Railroad to retain by the institution of this improved new service that less than carload business which it now enjoys. However, the Commission has held in numerous cases that even if some of this business should be recovered by the rails by the institution of the rail-truck service, nevertheless it would be by reason of a superior and new service and by reason thereof should be encouraged rather than discouraged. There are many cases on this proposition, but only a few will suffice.

The Chicago and Northwestern Railway Company, extension, 31 M. C. C. 455, at pages 457–458, Division 5 said:

"Contrary to protestants' contention; we are of the opinion that the proposed service will not adversely affect the operation of existing motor carriers. Applicant merely proposes to improve an existing service through the utilization of motor vehicles in rendering a service which will be auxiliary to, supplemental of, and coordinated with the rail service. Applicant does not propose to invade territory of any other carrier. All of the points are stations on the rail line which applicant has served for years and is under obligation to continue to serve. Applicant merely proposes to improve that service in an endeavor to retain existing patrons through offering them a service more in keeping with their requirements under existing merchandising methods. To say that such service will adversely affect the operations of the existing motor carriers is to admit the superiority of the proposed service which protestants strongly deny."

In Great Northern Railway Company, extension, 19 M. C. C. 745, at page 747, Division 5 said:

"There are two motor carriers and a railroad operating between Great Falls and Lewistown, in addition to applicant's rail service. It is contemplated that considerable traffic would be diverted from applicant's present rail operations and the record indicates that some traffic would be diverted from the existing motor carriers if the proposed service is instituted. Applicant's freight agent stated in response to cross examination that such diversion could be expected."

And with this evidence of the probability of diversion a certificate was issued to the applicant.

We again quote from Indiana Railroad, extension of operations, 27 M. C. C. 176. At page 178 Division 5 in handling a similar situation said:

"Similarly for the reasons stated at length by Division 5 in the report in that case, we believe that applicant should be permitted to substitute motor carrier services for its present rail service, and thereby continue to handle the traffic of shippers it has served for long periods of time. Applicant's retention of its present traffic admittedly can have no effect on existing motor carriers between the same points and any future diversion of traffic either to applicant or from applicant to other carriers will be influenced by the best service available to the shippers. Under such circumstances it cannot be said that competition fostering such improved service is detrimental to the public interest."

In Texas & Pacific Motor Transport Company, extension of operations, 30 M. C. C. 465, at page 467, Division 5 said:

"The proposed extension is not a new operation but merely an improvement of the service already performed by applicant in its present operation. The bulk of the traffic to benefit from the improvement is already being handled by applicant. If the improved service should attract additional traffic to applicant that fact should not deprive the public of the substantial advantages that would come from more expedited service."

In Seaboard Air Line Railway Company, extension of operations, 21 M. C. C. 773, at page 775, Division 5 said:

"There seems to be little question that the proposed rail-truck coordinated service is in the public interest, nor has it been shown that there will be any material diversion of traffic from existing independent motor carriers."

In Seaboard Air Line Railway Company, 17 M. C. C. 413, at page 433, Division 5 said:

"There seems little question as to the proposed rail-truck coordinated service being in the public interest, nor does it appear from the records made in these cases that there will be any great diversion of traffic from existing independent motor carriers."

In the instant case, protestants on several occasions state that there is only a small amount of less than truckload traffic now being handled by all of the protestants and, therefore, it is conclusive that there is little chance, if any, of the protestants being affected.

Necessary to Deal With Several Independent Motor Carriers

Protestants raise the point repeatedly that because there are a large number of carriers in the field that that is conclusive and that The Pennsylvania Railroad should not be permitted to employ its own subsidiary. The same condition exists in this case as in practically all of the other cases cited to the effect that it would be necessary for The Pennsylvania Railroad to deal with several carriers rather than one. There is no one particular independent motor carrier herein who serves all of the routes and all of the cities and towns involved. The evidence is clear that The Pennsylvania Railroad desires to deal with only one carrier wherever possible, and the evidence is plain that it can do so more effectively, efficiently, and economically. This is particularly true by reason of the fact that the applicant is now serving practically the entire Pennsylvania Railroad west of the Indiana-Ohio State line in station-to-station operations. There are 25 routes now in operation paralleling The Pennsylvania Railroad in station-to-station operation in that particular territory. The applicant is an existing carrier and one who renders this particular type of service in over-the-road operation and is more experienced in this

particular type of service than any other carrier involved. The applicant and The Pennsylvania Railroad introduced in the evidence the reasons why the railroad desired the applicant. Other reasons it attempted to introduce, but the evidence was objected to by protestants and the Examiner ruled these reasons out, which undoubtedly was error. In any event, though the reasons were ruled out, the evidence is clear with the inferences that can be drawn from the evidence that The Pennsylvania Railroad can be better served by the applicant herein in an extended service in connection with the operation over the 25 routes than any large number of independent operators in the State of Michigan.

This same proposition has been decided in practically every one of the cases which we have cited so far herein. It was decided in Kansas City Southern Transport Company, Inc., 28 M. C. C. 5, Kansas City Southern Transport Company, Inc., 10 M. C. C. 221, and The Willett Company of Indiana, Inc., extension of operations, 21 M. C. C. 405.

A similar case is Gulf, Mobile and Northern Railroad Company, common carrier application, 18 M. C. C. 721.

On pages 725–726, Division 5 said:

"In order to establish the proposed coordinated service through the cooperation of independent motor carriers it would be necessary for the railroad to make arrangements not with one but with many, each performing a more or less disjointed part of the entire service, and it would also be necessary for the motor carriers to obtain authority to serve many of the rail points which they do not now serve. Moreover, all-serve points not served by the railroad, and would find it necessary to adjust their schedules to meet the needs of the coordination with the rail service without disrupting or impairing their service to the off-rail points. It is urged in addition to these difficulties unless the same management controls both means of transportation it would be impossible to coordinate rail-truck service on a sound basis. In view of the close adjustment of schedules and interchange arrangements which good and dependable service would require, as well as the contemplated joint use of stations and employees, we believe that there is sound ground for this contention."

This last case is practically like the instant case and the reasoning applies with equal force to it.

The evidence in our case coming from the independent protestant motor carrier operators is to the effect that their schedules do not fit the proposed schedules of the applicant, nor do they meet the requirements of The Pennsylvania Railroad. These protestant witnesses stated that in their judgment the schedules were not in line with those needed by the shipping public and

that if they performed the service for The Pennsylvania Railroad it would be necessary for them to put on additional schedules, schedules which were different from the ones that they need to use in connection with their general motor carrier traffic. It therefore follows that as far as the use of equipment on the highways is concerned, that the putting of equipment on the highway by the applicant would be no different than putting it on the highway by the independent motor carriers as they would be unable to carry it on their present equipment nor in accordance with their present schedules.

## VI. Miscellaneous Points Raised by Protestants

Protestants make the point a number of times that because some of the protestant motor carriers are now serving the Pere Marquette Railroad in a few small routes in what they call a service similar to that of the applicant, that this is conclusive. The mere fact that service may be rendered for one railroad does not prove the necessity for that particular motor carrier serving the applicant. For one thing, there is no showing that the conditions and circumstances of the operations of the two railroads are identical, or that the schedule of operations are even similar. There is no basis of comparison.

From the evidence it is apparent that the Pere Marquette Railroad does not parallel The Pennsylvania Railroad. Therefore, the routes in question are not the same as those sought by applicant. The argument is equally effective then that the applicant is now serving The Pennsylvania Railroad over 25 other routes and doing it satisfactorily and, therefore, because of that reason alone, without taking anything else into consideration, the applicant should receive the extension over the routes in hearing.

Protestants complain of a number of rulings on the evidence during the hearing. This matter has been sufficiently briefed by protestants and we believe they have not set forth any reasons for the reversal or change of the rulings. In any event these objections were not material.

Protestants object strenuously to the reasons given by The Pennsylvania Railroad as to why they prefer their own subsidiary to an independent carrier. We believe the reasons we gave are adequate. These same reasons have been upheld in practically all of the other cases, and need not be further argued at this place.

Protestants take the position that there is only one kind of a certificate of convenience and necessity which can be issued, that it is the same under all circumstances and conditions. This ar-

gument is incorrect. The certificates which have been issued to the applicant covering its present 25 routes in operation are each and all limited and restricted; the certificate of a motor carrier engaged in general operations usually is not restricted. The Commission has not acted haphazardly, nor without due consideration in these restrictions, which it has placed in the station-to-station operation certificates. The protestants' contention that all certificates are alike is without merit.

Protestants argue at length that there must be shown a yearning need upon the part of the shipping and receiving public for this type of service. These claims of protestants are not in line or keeping with the decisions of the Commission. Protestants lost sight of the fact that The Pennsylvania Railroad already has the service which it is rendering to its patrons and to require it to show a need for that service is beside the question. The need for The Pennsylvania Railroad's present service to its patrons does not have to be established, nor under the decisions is there a necessity for showing a yearning need upon the part of the shippers and consignees for the railroad to be permitted to improve its service. This matter has been thoroughly discussed hereinbefore, and extracts from the decisions of the Commission have been set forth which thoroughly answers this contention of protestants.

At many places in the exceptions is there made the claim that there is not one centilla of evidence upon this point, nor in line on another, or an absolute failure to prove on another point, that it is useless to attempt by argument to refute these statements. We have, therefore, set forth extracts from the testimony of the shipper witnesses, both for the applicant and the protestants, and a casual reading of this testimony explodes practically all of the claims of protestants.

Protestants claim that applicant thinks the mere fact that it is a subsidiary of the railroad automatically entitles it to a certificate without any showing of any kind whatsoever. This has not been our position. We submit that we have met all of the elements of proof in this case and are, therefore, entitled to a certificate.

There are the charges of the Railroad boasting and the applicant's witnesses getting angry at the thunderous cross-examination of protestants. It is the opinion of applicant that the anger and boasting was not done by applicant's witnesses. At one place in the exceptions, protestants claim that the time has arrived for a show-down, apparently feeling that something drastic is about to happen.

On page 15 of the exceptions, comment was made by protestants that their witness Duncan testified at great length concerning the

lack of business both inbound and outbound at the very small points the Railroad contends it wants the applicant to serve. Again at page 15 the statement is made to the effect that the testimony of this witness Duncan on that point is of great importance, because it demonstrates that there is not enough service to justify the present truck operations over these routes, let alone warrant the imposition of a new line in that field. On pages 21 and 22 there is the statement that "as the transcript shows and as our brief points out, we presented testimony, that was not even attacked, going to show that the tonnage moving to and from these points is so small as not to warrant the continuation of all this motor carrier service, let alone the addition of a competing carrier." Again at page 86, under protestants' point 10, is the claim "it is shown that the tonnage to and from the small points involved is not sufficient to justify the present available motor carrier service and that the entry of another carrier would further complicate the situation."

These are admissions upon the part of the protestants that they do not have sufficient business of less than truckload freight to be of any consequence; and therefore they cannot be damaged if they were even to lose it all. On the other hand, the uncontradicted evidence of applicant was to the effect that they have hundreds of thousands of pounds of freight moving over these various routes in definite regularity. The exhibits introduced in the evidence specifically set forth the exact tonnage on each route. A casual examination of these exhibits of this tonnage shows that The Pennsylvania Railroad does have sufficient business to turn over to the applicant for the successful operation of these routes in daily service, and the mere fact that protestants have no business is beside the issue. The Pennsylvania Railroad has the business to turn over to the applicant and desires to do so that it will be done economically, expeditiously, and efficiently. The regular schedules of the protestants are out of line with those needed by the railroad. Therefore, it would require new schedules and new equipment to be placed on the highways by the protestants if they were to be given the business. We are not going to repeat here the many unassailable reasons why The Pennsylvania Railroad can use the applicant to better advantage than these several competing independent motor carriers, none of whom could cover the operations in their entirety.

## Duplicate Service

Protestants argue at length and in many places that the applicant proposes to render a duplicate service in this that The Penn-

sylvania Railroad does not intend to take the way car off of the local freight train, but that it desires to continue to operate the way car on the local freight train and for the applicant to operate the motor vehicles over the truck routes in addition. These objections are pure figments of imagination. The positive testimony of the applicant's witnesses was to the effect that one of the main purposes in securing the application was for the purpose of taking the way cars off of the local trains.

Under Ex Parte 129, the procedure was set up whereby the substituted service of this type and kind could be rendered by motor carriers on behalf of railroads. Kipp's National Substituted Freight Service Directory, as the Commission judicially knows and as is shown by the evidence, modifies the tariff of The Pennsylvania Railroad to the extent of advising the public that the railroad reserves the right to transport this freight in whole or in part under its bills of lading over the routes of the respective motor carriers as set forth in this directory. Under Ex Parte 129, there is the limitation which was suggested and which has been carried over into Kipp's Directory to the effect that the shipper has the right to ask that the shipment be made by rail in its entirety. It is only in such a contingency that it would be necessary for the railroad to carry any less than carload freight on any of the local freight trains referred to. This matter was thoroughly explained on the witness stand by applicant's witness, Mr. Christie. No issue was made of this proposition at the hearing, and if it had been, Mr. Christie would have explained definitely and in detail that no such request had ever been made upon the part of the railroad in any of its operations and he would have explained, if he had been asked by protestants, exactly how the matter would have been handled. In any event, the rare possibility of the movement of a small amount of l. c. l. freight by rail does not justify the claims of protestants that the railroad does not intend to take the way car off of its local freight trains, and that it intends to operate a duplicated service. What applies to The Pennsylvania Railroad in all of its substitution truck service equally applies to practically all of the railroads, as they are parties to the same Directory.

Complaint is also made that The Pennsylvania Railroad seeks to reduce the wages of its employees and to reduce the number of working hours, with the inference that there is something detrimental in such procedure. The facts are, as testified to by Mr. Christie, that it is the desire of the railroad as one of its economies, to cut down the time of the operation of the local freight trains, which in turn will cut down the overtime of railroad employees. Anyone who understands the operation of a

railroad knows that this will not cut down the regular pay of the employees. It is only in line with the declared public policy of Congress as expressed in the various laws covering the subject, that employees should not be worked overtime. Therefore, penalties are placed in wages for overtime. These objections, therefore, are baseless.

Protestants complain that they were denied the issuance of a subpoena duces tecum during the interval between the two hearings and that The Pennsylvania Railroad should have been compelled to prepare certain figures for them. The Examiner was correct in his rulings in these instances, which are in line with the rules of the Commisison. A number of exhibits, including a large amount of pertinent figures and material, were introduced in the evidence by applicant. Nothing of this type or kind was introduced by the protestants showing their operations.

Protestants insisted upon a showing being made upon the part of the protestants in exhibit form, or furnishing them with exhibits showing the amount of tonnage moving to and from the various intermediate points. Our exhibits along this line showed the tonnage moving over the routes, which, in our judgment, is sufficient for all practical purposes.

We have referred to schedules hereinbefore. Protestants lose sight of the fact that the object of the institution of the proposed rail truck service is to coordinate and supplement the service of The Pennsylvania Railroad and not to coordinate and supplement the service of the independent truck lines. This is a basic part of the applicant's case, which was never understood by the protestants or deliberately disregarded by them.

Complaint is made that shipper witnesses of the applicant did not understand the minute operations of the railroad trains and truck schedules to be instituted by the applicant. How could they? Why should they? It is only under rare circumstances that the individual knows the operation of a railroad or of a truckline as to how the various trains or trucks move. It will be recalled that each and every one of the shipper witnesses for applicant had explained to him what the service would be, and how the movement of the freight would be expedited, and with that assumption the witnesses were asked whether or not that service would serve the convenience and necessity of their respective businesses, and every one of them stated that it would, and in addition practically every one of protestant's shipper witnesses, after much prodding, were compelled to admit that such expedited service upon the part of applicant would serve the convenience and necessity of their respective businesses and would be of benefit and use to them in their respective businesses.

Yet time after time the claim is made by protestants that such is not the case. We again refer to the extracts of the evidence set forth herein.

Protestants, on page 3 of their exceptions, reveal their complete lack of understanding of this type of case when they say, "The next reason the Commission recites is that the railroad would have to make arrangements with more than one protesting motor carrier. What of it? The only question before the Commission is whether or not the service is available—not whether it is available by one or a dozen carriers," and then proceeds to say, "such nonsense has never prevailed and never will where an ordinary motor carrier is involved."

This is another example of the lack of understanding upon the part of protestants of the underlying principal set forth in the various decisions.

In spite of many protestations, protestants at no place in the evidence offered any plan or any suggested plan of cooperation or coordination with that of The Pennsylvania Railroad. Their evidence was conclusive that their present operations are completely disjointed as far as The Pennsylvania Railroad train services are concerned, and their operations do not fit into the needs of The Pennsylvania Railroad at all. The mere statement on their part to the contrary does not supply evidence to that effect.

## War Times

Protestants complain that these are war times and the conservation of effort and elimination of duplication is now the order of the day and charge that the railroad proposes to reverse the trend. These accusations are not in line with the testimony. The applicant is seeking not a war-time certificate, but a permanent certificate. The Pennsylvania Railroad, as is shown by the evidence, has the tonnage now moving over its railroad to turn over to the applicant in peace time or in war time in sufficient volume to carry on a successful operation as sought in the application.

We have already commented on the effort of protestants to impeach some of the shipper witnesses who had testified by stipulation at the hearing at Indianapolis two months before the Lansing, Michigan, hearing. No valid offer of proof was made, nor any attempt to track the law as far as impeachment was concerned.

## L. T. L. Freight.

Protestants object to the report and recommended order of the Examiner on the grounds that there was no restriction to less than truckload freight to be handled by applicant in the event a

certificate should be issued. We have already replied to this in another place herein. Protestants use the term "less than carload freight" and "less than truckload freight" interchangeably. These terms are not synonymous. The evidence of applicant is such that there can be no doubt that the only service which it is seeking to render is that covering less than carload freight and that no carload freight is to be handled by the applicant. It was explained by applicant's company witnesses that this is the same type of service in force over all of the 25 routes now in operation. There is sufficient recital of this proposition in the evidence, in the Examiner's report, and in the other orders heretofore issued by the Commission to adequately cover this point.

The charge is made that by reason of the fact that seven routes are sought that therefore it represents a tremendous "grab" of authority and business sought by the applicant. Protestants seem to think that the mere size of the request seems to be one of the applicant's chief grounds for seeking the authority, and then seems to think that it has not had ample opportunity to express itself in its briefs and exceptions and desires oral argument to reiterate.

Much is said regarding the desire for a rehearing. No ground has been set forth as to why a hearing should be granted. The protestants have had every opportunity in the world to present their case. When the case first came up at Indianapolis after the applicant had finished its case, the protestants were not prepared to introduce their evidence. They then had several months' time in which to analyze the transcript of applicant's testimony and in which to prepare their case for presentation at Lansing, Michigan, and now they want a rehearing, or an additional hearing. We submit there has been sufficient delay in this case so far and that this matter should be brought to a conclusion. We believe the report and recommended order of the Examiner is correct and should be sustained at an early moment so that this service can be placed in operation over the seven routes in question without further delay. No reason for a rehearing has been stated. Reasons required under the rules have not been stated. Mere desire is not enough.

We have hereinbefore referred to the request for oral argument by protestants and we find no adequate reasons set forth therein. The Commission has set forth and defined the rules governing this point. At the hearing and in the briefs and exceptions, protestants have thundered away at and criticized bitterly the fundamental rules and decisions laid down by the Commission governing this class of cases, but just because protestants do not agree with the long line of decisions does not furnish sufficient reason for them having opportunity for further delay and further argu-

ment. We can see no good that can come from such delays. Protestants are represented by capable counsel who have painstakingly prepared briefs and exceptions herein. Certainly all that could be done at an oral argument would be to repeat and place emphasis upon the arguments already made. It is inconceivable that any more emphasis could be made than has already been made. There is no disposition upon the part of counsel for applicant to object to oral argument if the Commission feels that under the circumstances it is necessary. We are only objecting in the interest of time, and do not believe that the request comes within the rules of the Commission, particularly as there is no new or novel question involved.

## Convenience and Necessity

We cannot close this reply without discussing under a specific heading the question of convenience and necessity. This has been covered under other headings in this reply, particularly wherein we discussed public need and public interest. However, before closing we desire to call attention to pertine t statements in a few decisions.

We have hereinbefore replied to the claims of protestants that convenience and necessity can only be had in a case of this type the same as if the application were by an ordinary motor carrier seeking an entirely new independent motor carrier's business. This of course is not the law. Whereas in the instant case the railroad is only seeking to improve a present existing service by substitution of trucks for way-car service.

Convenience and necessity in this type of cases is determined on an entirely different basis than protestants assert.

As was said in the Dixie Ohio Express Company, extension of operations, 30 M. C. C. 291, at page 295, by the Commission:

"In our opinion public convenience and necessity in a proper case may be found in operating economy, and those things which contribute to expedition, safety, and efficiency in operation, all of which though they benefit first the carrier indirectly contribute to public safety and more reliable, more expeditions and cheaper transportation. Given a proper showing of these things a finding of public convenience and necessity is justified."

This covers this type of case in a nutshell. In the instant case this element of evidence has been amply shown. We have shown operating economy; we have shown that the service will be expedited; that the service to each and every one of the cities and towns on The Pennsylvania Railroad over the seven routes involved will have the freight expedited from 24 to 72 hours, depending upon the particular circumstances as testified to in detail;

we have shown the efficiency of the operation. Complaint is made by protestants that the benefits to the railroad are not evidence of benefits to the public, but in this decision it is said:

"All of which though they benefit first the carrier, indirectly contribute to the public safety and more reliable, more expeditious and cheaper transportation."

Our case has an abundance of evidence along these lines and therefore convenience and necessity has been established.

In Seaboard Air Line Railway Company, extension, 21 M. C. C. 773; at page 775, Division 5 said:

"While it may be true that in those instances there is adequate motor carrier service now available, it is clear that the applicant's proposed service will expedite deliveries of less than carload shipments which now move by rail with some operating economy. Several cases upon a similar set of facts we have granted appropriate operating authority (citing authority)."

And continuing on the same page, Division 5 said:

"There seems to be little question that the proposed rail-truck coordinated service is in the public interest."

The Pennsylvania Railroad has the freight and is now moving it. It is not required to show convenience and necessity in moving it. It has the legal duty to continue rendering it. It is its obligation to transport it and to continue to transport it.

In Kansas City Southern Transport Company, Inc., 28 M. C. C. 5, at page 9 this obligation was discussed and the Commission said:

"The traffic under consideration would be chiefly so-called package or merchandise freight, less than carload quantities is of course, traffic which the railroads are and have been under an obligation to transport and which they will continue to transport whether we grant or deny the application. So far as such traffic can be moved in well loaded cars on through trains which serve only the larger points, it can be handled more efficiently by rail. The railroads have no need for substituted truck service for such rail service. The way freight train service which is used in serving the smaller stations is, however, uneconomical and inefficient and trucks can be used in substitution therefor to much advantage both to the railroads and to the public served. Division 5 found in 10 M. C. C. 221 and we agree that reduction in the cost and increase in the efficiency of transportation service inures to the benefit of the general public and are required by public convenience and necessity."

In J. H. Axley, extension of operations, 30 M. C. C. 387, at page 389, Division 5 said:

"We do not believe that we are precluded from finding that the public convenience and necessity require an operation of the

character here proposed simply because of the absence of direct evidence showing a public need or desire for the service proposed. Under the terms of the Act we are charged with the responsibility of promoting safe, adequate, economical and efficient service, and in our opinion public convenience and necessity in the proper case may be found in operating economies and in those things which contribute to expedition, safety and efficiency of operation, all of which though they benefit first the carrier indirectly contribute to public safety, and the more reliable, more expeditious and cheaper transportation."

Yet in spite of all of these decisions of the Commission protestants still contend that this is not the law, and that they are entitled to a "showdown."

We believe that we have presented our case at all times in line with the decisions of the Commission. Because applicant cited these various decisions at the hearings and relied upon them, we were charged with being boasters, with feeling that we already had the decision in hand and decided by the Commission in advance. The evidence presented by applicant in this case is in line with the evidence presented by it under its other applications covering its 25 routes and in line with the evidence presented by applicants in each and all of the other rail-truck carrier cases, and we believe it conclusive and justifies the Commission in affirming the Examiner's report and recommended order and granting a certificate of convenience and necessity to applicant.

## Jurisdiction

In our brief we cited some of the authorities going to the proposition of jurisdiction, which hold that the commission is without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle, and that such could only be accomplished through voluntary cooperation. We do not believe that this matter need be gone into at length as the proposition is not assailed by protestants with any citation of authority.

In The Willett Company of Indiana, Inc., extension of operations, Illinois, Indiana and Kentucky, 21 M. C. C. 405, at page 409, Division 5 said:

"In addition we are without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates, and we have no power to require their establishment. It follows that any such plan must be dependent on voluntary cooperation."

The same objections were made in that case by protestants, but Division 5 rightfully stated the law, that there was no jurisdiction.

In Rock Island Motor Transit Company, common carrier application, 21 M. C. C. 513, at page 518, Division 5 said:

"We are without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates, and we have no power to require their establishment. It follows that any such plan must be dependent upon voluntary cooperation."

There are many other cases to the same effect; the same thing was held in Kansas City Southern Transport Company, Inc., 10 M. C. C. 221 (235–236).

In Louisiana, Arkansas & Texas Railway Company, 22 M. C. C. 213 (216). The same language as hereinbefore set forth was given identically and then was added the following:

"In view of the close adjustment of schedules and interchange arrangements which good dependable service require, as well as the joint use of facilities, we believe the railway has sound grounds for its contention."

See also Gulf, Mobile & Northern Railroad Company, Common Carrier application, 18 M. C. C. 721 (725–726), wherein Division 5 held and elaborated on the same proposition that the Commission is without jurisdiction.

Therefore, it is conclusive that the Commission has no such jurisdiction.

## VII. Reply to Exceptions Filed By Norwalk Truck Line Company, Norwalk Truck Line Company of Indiana, Inc., Days Transfer, Inc., O. I. M. Transit Corporation, Wolverine Express, Inc.

All references in this reply hereinbefore have been directed to the exceptions filed by Interstate Motor Freight System and Parker Motor Freight, but generally speaking applied to all.

All of the exceptions claimed by the other protestants are contained in the first set of exceptions and have heretofore been replied to. Therefore, there will be no specific reply made to the exceptions enumerated in the last heading.

## VII. Conclusion

Wherefore, Applicant respectfully says that each and all of the exceptions claimed by protestants are unfounded and without merit and should, therefore, be overruled. Applicant respectfully prays that its application be granted in its entirety, that a cer-

tificate of convenience and necessity as prayed for, be granted to it.

Respectfully submitted.

THE WILLETT COMPANY OF INDIANA, INC.,
By HARRY E. YOCKEY, *Its Attorney.*

EARL W. MUNSHAW,
KIRKWOOD YOCKEY,
*Of Counsel.*

Dated December 16, 1942. 1250 Consolidated Building, Indianapolis, Ind.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record by mailing by first class mail a copy thereof, properly addressed, to all parties.

Dated at Indianapolis, Indiana, this 16th day of December 1942.

HARRY E. YOCKEY,
*Attorney for Applicant.*

1178 BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-2815—Sub No. 6

THE WILLETT COMPANY OF INDIANA, INC. EXTENSION—FORT WAYNE, INDIANA—MACKINAW CITY, MICHIGAN

*Reply to Exceptions*

Dec. 17, 1942

*May It Please the Commission:*

This Reply is filed on behalf of The Pennsylvania Railroad Company, a corporation, as Intervener in support of the within application of The Willett Company of Indiana, Inc., in reply to the Exceptions filed by the Protestants: (1) Days Transfer, Inc., O. I. M. Transit Corporation and Wolverine Express, Inc.; (2) Norwalk Truck Line Company and Norwalk Truck Line Company, of Indiana, Inc.; and (3) Inter-State Motor Freight System, and Parker Motor Freight, to the Report and Order recommended by Examiner Walter W. Bryan, served September 14, 1942.

I

In the Exceptions of Days Transfer, Inc., I. M. Transit Corporation and Wolverine Express, Inc., the following language is quoted from pages 3 and 14:

"That public convenience and necessity require the proposed operation but that operations conducted thereunder shall be limited to the transportation of freight having a prior or subsequent movement by rail."

The Intervener, in answer to this alternative suggested finding of said protestants, contends that that portion which reads "having a prior or subsequent movement by rail" be eliminated. This alternative suggestion on behalf of counsel for said protestants appears to be a candid and frank statement, which shows that there is evidence of record to substantiate a finding such as was made by the Examiner in the recommended report and order under consideration in the within application.

The evidence offered on behalf of the applicant and intervener fully discloses a definite manner and method of proposed motor-truck operation and the need of this supplemental and auxiliary service by motor truck.

The evidence shows that certain peddler or way freight service cars will be eliminated in what is commonly called station-to-station service and a box car-saving effected. This evidence has not been disputed and stands uncontradicted.

The following excerpt is quoted from pages 13–14 of said Exceptions:

"If the service proposed herein is desired by applicant and intervenor to be purely supplementary to, or auxiliary to, the existing rail service, the authority might be granted with the 'prior or subsequent movement by rail' restriction without too seriously affecting the interests of common carriers by motor vehicle serving the territory involved. Such a restriction would insure the new operation as being, in truth and in fact, supplementary to, or auxiliary to, existing rail service and would not be objectionable to protestants represented by us."

We submit that the conditions now contained in the Recommended Report and Order should suffice. Similar conditions were made a part of the Order in a Report served May 13, 1941 in the application of The Willett Company of Indiana, Inc., Subs. 3, 4, and 5, as are contained in the Sub. 6 Recommended Report of Examiner Bryan.

II

A reply to the Exceptions of Norwalk Truck Line Company and Norwalk Truck Line Company of Indiana, Inc. will be found in the discussion under section III.

## III

### A

A great portion of the Exceptions of Interstate Motor Freight System and Parker Motor Freight is devoted to an attack on the findings of the Commission in the decision of Kansas City Southern Transport Co. case.

We believe that references to decisions in other similar cases fully answer the contentions now raised by said protestants.

The numerous reports of Division 5, in which railroads were granted authority to conduct motor vehicle operations similar to those here involved, were decided prior to the Commission's decision in the Kansas City Southern case. And since that case was decided, further precedent has grown up to support the granting of this application. In its decision of August 22, 1941 in MC-42615 (Sub-No. 5), Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Extension—South Dakota, Division 5 granted the Chicago and North Western Railway Company authority to conduct similar operations between points on its lines in South Dakota and Nebraska. In MC-86779 (Sub-No. 3), Illinois Central Railroad Company Extension of Operations—Illinois, it has been granted authority to conduct motor vehicle operations along fourteen routes paralleling its lines in north-central Illinois. And by a decision dated September 8, 1941, in MC-86779 (Sub-No. 1), Illinois Central Railroad Company—Kentucky-Tennessee Extension, Division 5 granted the Illinois Central the right to conduct the same type of motor vehicle operations along seven routes paralleling its lines in Kentucky and Tennessee.

We ask the Commission to find in this case, on the basis of the detailed showing we have made at the hearing herein, a showing which was discussed in detail in the brief of applicant of August 21, 1942, to which reference is here made, that applicant is entitled to authority to conduct the operations covered by this application.

From the application of Indiana Railroad (Bowman Elder, Receiver) Extension of Operations—Fort Wayne via Muncie, No. MC-48645 (Sub-No. 6), reported in 27 M. C. C. 176, the following language is quoted as appearing to be analogous to the situation which presents itself in the instant case:

"Similarly, for the reasons stated at length by division 5 in the report in that case, we believe that applicant should be permitted to substitute motor-carrier services for its present rail service and thereby continue to handle the traffic of shippers it has served for long periods of time. Applicant's retention of its present traffic

admittedly can have no effect on existing motor carriers between the same points, and any future diversion of traffic either to applicant or from applicant to other carriers will be influenced by the best service available to the shippers. Under such circumstances it cannot be said that competition fostering such improved service is detrimental to the public interest."

B

This Commission, as Well as Various State Commissions, Has Encouraged and Recomended the Adoption and Use by the Railroads of Coordinated Rail-Truck Service

As long ago as April 10, 1928, over twelve years ago, the Commission declared that railroads should be authorized to operate motor vehicles on public highways. In Motor Bus and Motor Truck Operations, 140 I. C. C. 685, 745, the Commission said:

"Railroads, whether steam or electric * * *, subject to the interstate commerce act, should be authorized to engage in interstate commerce by motor vehicles on the public highways, * * *."

In Coordination of Motor Transportation, 182 I. C. C. 263, 375, the Commission said:

"The railroads have undertaken to test the possibilities of trucks and other new facilities for use in conjunction with rail service; their use of trucks in substitution for train service in areas of light traffic has been uniformly beneficial in reducing costs and improving service; * * *."

The first two findings of the Commission in that report (182 I.C. C. 263, 379) are as follows:

"Upon consideration we conclude:

1. That transportation by motor vehicles, busses and trucks, over the public highway is, within certain distances, and in certain respects a superior service, and that the rail * * * lines should be encouraged in the use of this instrumentality of commerce wherever such use will promote more efficient operation or improve the public service;

2. That there is substantial competition between rail and water carriers, on the one hand, and motor carriers on the other for the transportation of both passengers and freight and that this competition is increasing: * * *."

In its 46th Annual Report, dated December 1, 1932, the Commission said, at page 21:

"In our judgment there is great opportunity for the advantageous use of motor trucks and busses to supplement or in substitution for railroad service, and we welcome the numerous experiments which are being made in this direction."

In its 52nd Annual Report, dated November 1, 1938, the Commission said, at page 13:

"Many railroads are using trucks in lieu of local way-freight service with much advantage."

And in Great Northern Railway Co. Common Carrier Application, 1 M. C .C. 73, 76, the Commission said:

"We are of opinion that the substitution of motor service over the highways for local service over the rails * * * is distinctly in the public interest."

From the Kansas City Southern Transport Co., Inc., 28 M. C. C. 5, the following is quoted:

"It was further found, and properly we think, that the development of the coordinated service would not seriously endanger the operations of existing motor carriers, but that, in any event, the public ought not to be deprived of the benefit of an improved service merely because it might divert some traffic from other carriers, pointing out that had that principle been followed no motor-carrier service could have been developed."

C

From an examination of Exhibit No. 20 introduced on behalf of the Interstate Motor Freight System, it appears that there is no intermediate point served by the Interstate between Fort Wayne, Indiana, and Sturgis, Michigan, a distnce of approximately fifty-seven miles.

It is further noted that no point is listed on Exhibit 20 showing any daily direct service to any point of The Pennsylvania Railroad Company north of Cadillac, Michigan, to the northern point of the Grand Rapids Branch at Mackinaw City.

No points are shown on the Branch between Cadillac and Traverse City or any intermediate points between Grand Rapids and Muskegon Heights, and no points on the Branch between Petoskey and Harbor Springs.

From the application of Chicago, Rock Island & Pacinc Railway Company reported in 19 M. C. C. 702, the following is quoted from pages 703–704:

"Since 1930 applicant has lost a substantial amount of less-than-carload traffic to competing motor carriers in the considered territory. For example, tonnage moving from or to points on its Horton-Fairbury branch line decreased from 10,000,000 pounds in 1930 to 4,000,000 pounds in 1937. This decline is attributed principally to the superior service of motor carriers and the growing inadequacy of rail service in the face of changing methods of merchandising. After long study applicant has concluded that

it must engage in motor-carrier operations in order to retain its present less-than-carload traffic and to furnish satisfactory and comprehensive service to the public.

"Applicant proposes to use motor-vehicle transportation as a substitute for its less-than-carload rail service and as auxiliary to, and supplemental of, its rail operations. Local freight trains would not be eliminated but would continue to handle carload business. Motor vehicles would transport less-than-carload shipments between applicant's railway stations in line-haul service. Collection and delivery service would not be performed by the line-haul trucks but would be provided by local draymen as at present. Operations would be conducted over regular routes generally paralleling applicant's rail lines. As stated, applicant desires to serve only those intermediate and off-route points which are stations on its rail lines, excluding Corydon and Ottumwa. Its facilities, agents, and other personnel would be utilized as fully as possible in the proposed service. The motor-vehicle traffic would consist principally of less-than-carload package freight and would move under rates on the same level as those applicable on rail traffic. Motor and rail schedules would be coordinated so that traffic could move by rail to break-bulk points, and thence be distributed by truck to the smaller way stations. Shipments between way stations on each motor route would move entirely by truck, and those between break-bulk points would move by truck or rail, whichever is more expeditious.

"Applicant pointed out various benefits that would accrue to its rail operations and to the public from the proposed service. Its present schedules of local freight trains are uncertain, owing to the variable times spent at way stations in loading, unloading, and switching cars. The use of motor vehicles would relieve local freight trains of less-than-carload shipments, permitting them to eliminate stops and reduce the time spent at way stations. These trains would be speeded up, overtime wages would be saved, and carload business would be expedited. The public also would be afforded more frequent and convenient schedules by truck, and shipments would be accepted later at points of origin and delivered earlier at points of destination. The existing traffic between the considered points is insufficient to warrant additional rail service but is sufficient to support the proposed motor-vehicle service. It also is claimed that motor trucks would be able to handle the available traffic in a much more economical and efficient manner than local freight trains.".

From the case of Chicago and North Western Railway Company v. The Buckingham Transportation Company of Colorado, et al., reported in 5 N. W. (2d) 729 (Advance sheet November 4,

1942), the Supreme Court of the State of South Dakota, the following is quoted from page 736 of said decision:

"We now hold that the commission, in the exercise of its discretion, may consider whether a proposed service will promote the public interest by strengthening and preserving as indispensable transportation service. That there was basis in the circumstances established by the evidence for a rational conclusion that purely incidental movement of l. c. l. freight between stations by truck would not only improve the character of applicant's railroad services to the public, but would also add vitality to a failing indispensable transportation service, we are convinced.

"The remaining contention of protestants finds answer in the matters we have just considered. The principle that, all things being equal, the commission would act unreasonably in failing to grant a motor carrier agency operating in the territory first opportunity to provide needed additional motor carrier service may be assumed. The principle can have no application if the established circumstances make room for the commission to conclude that the public interest will best be served by a different course. The private interests of the carrier must be subordinated to the public interest. That we deem the evidence sufficient to warrant an inference by the commission that the public interest would be served by permitting the applicant to carry on some incidental truck movements of freight between its stations as a part of its railroad operations, has been made sufficiently clear."

While there were other questions before the Court involving intrastate rights, that portion of the decision hereinabove referred to and quoted is applicable to the application under consideration and shows the trend of opinion of state courts where intrastate rights are involved, and the substitution of motortruck service for railroad service for the transportation of less-than-carload shipments.

From the Application of Louisiana, Arkansas and Texas Railway Company, reported in 22 M. C. C. 213, the following is quoted from pages 215–217:

"The Railway points out that it and its predecessors in interest have served the considered territory for approximately 50 years; that the parties do not seek to invade any new territory, nor do they contemplate the addition of another competing transportation agency in the territory; that no service will be afforded any point not served by the Railway; and that the authority requested involves a mere change in the type of vehicle used in the transportation of less-than-carload traffic now moving by rail.

"The Railway is now furnishing a less-than-carload or merchandise freight service which is expensive and in many respects

unsatisfactory and inefficient. For example, under the proposed service, freight from Shreveport and Dallas to other points on the Railway will be delivered from 1 to 2 days earlier than under the all-rail service, and the proposed service will result in an estimated saving in out-of-pocket cost of $43,000 per annum. A number of shippers testified in support of the application. They point out that the rail service is too slow and that a great improvement would result from the proposed operations, which would be a benefit to them and their businesses. For the most part, these witnesses were unfamiliar with the existing motor-carrier service, or did not avail themselves of such service, preferring for personal or business reasons to utilize rail service.

"The coordinated rail-truck service differs from the service given by the Railway alone, or by competing motor carriers alone. It is a new form of service, utilizing both rail and motor-vehicle transportation to advantage and in such a way as to render a merchandise service which is much less expensive and at the same time more expeditious and more convenient and generally satisfactory to the public served. That these results can be achieved, the record leaves no doubt.

"While there are a number of motor carriers operating in the considered territory, the Railway contends that any such plan of coordination through the utilization of their service would be impracticable. Only one of the protestants is shown to operate between Shreveport and Dallas. This carrier operates over the proposed route between Jefferson and Dallas, but it does not serve—nor it it shown that all of the protestants collectively serve—all of the points involved. In order to establish the coordinated service through the cooperation of these motor carriers, it would be necessary, therefore, for the Railway to make arrangements not with one, but with several, each performing a more or less disjointed part of the entire service, and it would be necessary for them to secure authority to serve rail points which they do not now serve. Moreover, most if not all serve points, and often important points, not served by the Railway. They would find it difficult to adjust their schedules to meet the needs of the coordination with the rail service without disrupting or impairing their service to the off-rail points. * * * Furthermore, we are without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates, and we have no power to require their establishment. It follows that any such plan must be dependent on voluntary cooperation. In view of the close adjustment of schedules and interchange arrangements which good dependable service requires, as well as the

joint use of facilities, we believe the Railway has sound ground for its contention.

"We are of the opinion that the proposed coordinated service here in question would serve a useful public purpose responsive to a public demand or need; that such service through voluntary cooperation of all or some of the protesting motor carriers is not here practicable; and that the useful public purpose which the proposed operations will serve cannot be served as well by other existing lines or carriers."

The Commission Has Repeatedly Sanctioned Plans for Coordinated Rail-Truck Service Such as the Applicant Proposes to Institute

The instant case is also identical in every material respect with a large number of other cases wherein the Commission has authorized railroad companies to substitute service by motor vehicle for slow local freight train service.

There are two ways in which railroads may achieve a substitution of motor vehicle service for local freight train service. One is by acquiring control of a motor carrier under the provisions of section 213 of part I of the Act, and the other is by securing under section 206 of the Act a certificate in the name of the railroad company or a subsidiary company to conduct the motor carrier operation in question. Railroads have employed both of these methods and the Commission has repeatedly held that the desired substitution of motor vehicle service for local freight train service should be approved.

The type of trucking operations which the Commission has approved railroads incorporating into the fabric of their rail operations was defined in Pennsylvania Truck Lines, Inc.—Control—Barker, 5 M. C. C. 9, 12, as follows:

"Approved operations are best illustrated by the substitution of trucks for peddler or way-freight service in what is commonly called 'station-to-station' service."

This was restated by Commissioner Caskie in his concurring opinion in Texas & Pacific Motor Transport Co.—Purchase—Johnson, 5 M. C. C. 89, 93, as follows:

"The illustration of operations which are auxiliary or supplementary to train service given in the cited case (Pennsylvania Truck Lines, Inc.—Control—Barker, 1 M. C. C. 101, 5 M. C. C. 9 and 49) is that of the substitution of trucks for peddler or way-freight service in what is commonly called 'station-to-station' service. These are operations such as are performed primarily for the controlling railroad with a view to enabling it to achieve greater efficiency and economy in the conduct of its business as a railroad."

The operations that the Commission has approved and which it has said are to be encouraged are thus seen to be exactly what the IC and Y&MV are here seeking authority to conduct.

Typical cases wherein railroads or their subsidiaries have been authorized to acquire control of independent truck operations under section 213 can be found in Volumes 1, 5, 15, 25 and 35 of the Commission's Motor Carrier Reports.

And in many cases which are on all fours with the instant case, the Commission has authorized the tying up of motor carrier operations with rail operations by granting the railroad company itself, or one of its subsidiaries, a certificate in its own right to operate vehicles as a common carrier by motor vehicle. The following railroads have been given certificates to operate motor vehicles in the same manner as the applicants are here seeking to operate them, namely, by the granting of a certificate under section 206 of the Act:

Kansas City Southern Railway: Kansas City Southern Transport Co. Inc., Common Carrier Application, 10 M. C. C. 221; also decision by entire Commission on oral argument and reconsideration, dated January 24, 1941, 28 M. C. C. 5.

Illinois Central Railroad: Illinois Central Railroad Company Common Carrier Application, 12 M. C. C. 485; also Extension Sub-2, Report of Division 5, Sept. 29, 1942.

Texas & Pacific Railway: Texas & Pacific Motor Transport Co. Common Carrier Application—Louisiana, 10 M. C. C. 525. Texas & Pacific Motor Transport Co. Common Carrier Application, 12 M. C. C. 37. Texas & Pacific Motor Transport Co. Extension—Wills Point, Texas, 14 M. C. C. 645. Texas & Pacific Motor Transport Co. Extension—Big Spring—Pecos, Texas, 14 M. C. C. 649. Texas & Pacific Motor Transport Co. Extension—Marshall, Texas, 20 M. C. C. 593.

Gulf, Mobile and Northern Railroad: Gulf, Mobile & Northern Railroad Co. Common Carrier Application, 18 M. C. C. 721.

Seaboard Air Line Railway: Seaboard Air Line Railway Co. Motor Operations—Caston-Garnett, S. C., 17 M. C. C. 413; also decision by entire Commission on oral argument and reconsideration, dated January 24, 1941. Seaboard Air Line Railway Co., Tampa Extension, 21 M. C. C. 773.

Missouri Pacific Railroad: Missouri Pacific Railroad Company Extension of Operations—Illinois, 19 M. C. C. 605. Missouri Pacific Railroad Company Extension—Arkansas-Louisana, 20 M. C. C. 563. Missouri Pacific Railroad Company Common Carrier Application, 22 M. C. C. 321.

Great Northern Railway: Great Northern Ry. Co. Common Carrier Application, 1 M. C. C. 73. Great Northern Railway Co. Extension—Hobson-Lewiston, 19 M. C. C. 745.

Chicago, Rock Island & Pacific Railway: Chicago, R. I. & P. Ry. Co. Ext.—Iowa, Mo., Kans. and Nebr., 19 M. C. C. 702; also decision by entire Commission on oral argument and reconsideration, dated January 24, 1941. Rock Island Motor Transit Co. Common Carrier Application, 21 M. C. C. 513.

Indiana Railroad: Indiana Railroad Extension—Ft. Wayne, 21 M. C. C. 73.

Louisiana, Arkansas & Texas Railway: Land Motor Lines Contract Carrier Application, 22 M. C. C. 213; also decision by entire Commission on oral argument and reconsideration, dated January 24, 1941.

Louisville and Nashville Railroad: Louisville and Nashville Railroad Company Common Carrier Application, docket MC-89811, decided by entire Commission January 24, 1941.

Chicago, Milwaukee, St. Paul & Pacific Railroad Company: Extension of Operations—Wisconsin and Michigan, 34 M. C. C. 475 (a petition for reconsideration was denied. Certificate was issued to applicant Dec. 10, 1942).

Each case contains so much that could be quoted in support of this application, that we hesitate to do more than merely refer to the cases.

See also the following cases:

Chicago & North Western Railway Company (Chas. M. Thomson, Trustee), Extension—Iowa, M. C. 42614, Sub. No. 6 (mimeographed), December 16, 1941.

Chicago & North Western Railway Company (Chas. M. Thomson, Trustee), Extension of Operations, South Dakota, 30 M. C. C. 379.

Chicago, Rock Island & Pacific Ry. Co., Extension—Iowa, Missouri, Kansas and Nebraska, 30 M. C. C. 621.

Kansas City Southern Transport Co., Inc., Common Carrier Application, 10 M. C. C. 221; 28 M. C. C. 5.

Northern Pacific Transport Co., Extension—Yakima-Prosser, 30 M. C. C. 58.

Willett Company of Indiana, Inc., Extension of Operations, Illinois, Indiana, and Kentucky, 21 M. C. C. 405.

There is no evidence in the written record for consideration of the suggested findings at conclusion of points 1 to 12 of Exceptions. We submit that each and every one should be denied.

While we realize that each case must stand or fall on its own facts, the record in this case is fully as conclusive as in the cases just cited that the granting of these applications will enable The Pennsylvania Railroad Company to use service by motor-vehicle to public advantage in their operations and that the public convenience and necessity requires the operation proposed. As said in the Commission's report on oral argument and reconsider-

ation, dated January 24, 1941, in the Kansas City Southern Case, supra, sheet 9:

"It must be borne in mind, as above indicated, that in all of these cases the railroad has been and is transporting the traffic in question between its stations and is under obligation to continue to do so. What it is seeking is not to enter a new field of service but to substitute a more efficient for a less efficient means of service. In both its direct and its indirect effect such substitution is in the public interest. An illustration which will come readily to mind is the widespread substitution in recent years of busses for rail service by local transit companies. One competitive carrier has no vested right in the continuation by another of an inefficient method of operation, and we believe it to be neither the policy of Congress nor the proper function of this Commission to retard any form of progress in transportation which will serve the public interest."

If the Commission is going to weigh this application on the same scales on which it has weighed these other applications, the instant application must be granted.

We submit that no further specific conditions or restrictions should be imposed in this Order, inasmuch as applicant's operation by motor vehicle will be auxiliary to or supplemental of rail service.

The shipper witnesses appearing and testifying in behalf of this service favor the establishment of the proposed service as an improvement in transportation facilities. Many shippers prefer to deal with applicant because of its being a wholly-owned subsidiary of The Pennsylvania Railroad Company and because of its established and complete responsibility.

We submit that the record in this case compels the conclusion that the service here proposed, involving as it does only the transferring of applicants' less-carload tonnage from a freight car to a motor truck, will not and can not endanger or impair the operations of existing carriers contrary to the public interest. Therefore, since this new operation will serve a useful public purpose, responsive to a public demand and need, and since this purpose cannot and will not be served as well by existing lines or carriers, we submit that we have shown beyond doubt that the proposed service is required by the public convenience and necessity and that certificates should be issued to applicants authorizing the proposed operations.

CONCLUSION

The applicant in the within application as amended is seeking authority to extend its motor-truck operation from Fort Wayne, Indiana to Mackinaw City, Michigan. The proof in the record

of this application covering the proposed operation is very convincing, as convincing as in any prior case of this sort that the Commission has had presented to it for consideration. The Commission has consistently approved similar operations of this kind and ought to do so here by granting the within application as amended.

Approval of the proposed operation plan will vastly improve the handling of merchandise of less-carload shipments for The Pennsylvania Railroad Company over proposed routes. The Commission has long recognized that the way-car is poorly adapted to transporting such freight and has in a long line of cases authorized railroads to replace their way-cars with motor trucks. That is all that applicant seeks to do here: to use motor-vehicles in lieu of way-freight cars to transport the less-carload traffic of The Pennsylvania Railroad Company. The applicant presents a plan of operation which has been recommended, and approved by this Commission in other applications, and it has supported this plan with competent evidence showing the desire and need of the public for the service to be accorded by that plan. Those cases should be followed here and the within application granted.

Respectfully submitted.

OSCAR LINDSTRAND,
*Attorney for The Pennsylvania Railroad Company as Intervener supporting applicant,*
*652 Chicago Union Station Bldg., Chicago, Illinois.*

DECEMBER 16, 1942.

Certificate of Service

I hereby certify that I have this day served the foregoing Reply to Exceptions of Protestants upon all the parties of record in this proceeding by mailing a copy thereof properly addressed to each counsel of record.

Dated at Chicago, Illinois, this sixteenth day of December 1942.

OSCAR LINDSTRAND.

1179 [Report of Commission, Sept. 25, 1943, omitted. Printed side page 10, ante.]

1188 INTERSTATE COMMERCE COMMISSION

No. MC 2815 (Sub No. 6)

THE WILLETT COMPANY OF INDIANA, INC. EXTENSION, FORT WAYNE MACKINAW CITY, MICHIGAN, CHICAGO, ILLINOIS

Present: Charles D. Mahaffie, Commissioner, to whom the matter which is the subject of this order has been assigned.

*Order*

Upon consideration of the record in the above-entitled proceeding, and of request of Mr. K. F. Clardy, representing certain protestants, for an extension of time within which to file a petition for reconsideration or rehearing of the report and order of Division 5 of September 25, 1943; and good cause appearing:

It is ordered, that the time within which petitions for reconsideration, rehearing, or reargument may be filed be, and it is hereby, extended to December 10, 1943.

Dated at Washington, D. C., this 16th day of October, A. D. 1943.

By the Commission, Commissioner Mahaffie.

[SEAL] W. T. BARTEL, *Secretary.*

1191 BEFORE THE INTERSTATE COMMERCE COMMISSION

MC 2815—Sub No. 6

IN THE MATTER OF THE APPLICATION OF THE WILLETT COMPANY OF INDIANA, INC., EXTENSION FORT WAYNE-MACKINAC CITY

*Petition for Reopening, Reconsideration, Oral Argument and Other Relief*

Nov. 26, 1943

(Figures in parentheses refer to pages of printed record unless contex clearly indicates otherwise.)

This cause was brought on before the Commission on the application of the Pennsylvania Railroad acting through it wholly owned subsidiary the Willett Company of Indiana, Inc. It involves an extension of route from Fort Wayne, Indiana, to Mackinac City, Michigan, with several branch lines included. It was heard over an extended period of time and resulted in a recommended report by an Examiner granting all the applicant sought with perhaps a little added for good measure. We filed exceptions which bear date of October 29, 1942. This printed document is a trifle over one hundred pages in length. In it we have discussed the evidence and the lack of it, together with the legal points involved. Division 5, however, in an Order bearing date of September 25, 1943, and which was served upon this protestant on October 15, 1943, has completely disregarded everything we said in our exceptions and granted to the applicant everything it seeks in the fashion it has requested.

The Order is rather short. Its brevity is in large part due to the fact that it has not even attempted to discuss any of the real-

issues involved in the proceeding. Indeed, it disposes of everything suggested by us by saying in a few words on Sheet 5:

"We are not impressed with protestant's contentions" * * *

At no place in the Order does the Division take up a single one of the points of law we have advanced. Neither do they discuss any of our contentions with regard to the evidence and the lack of it. Less than one page is devoted to a brief and incomplete analysis of the evidence presented by the protestants. The nature of this review is such as to convey a wholly erroneous understanding and impression of the evidence. Some statements made in the Order indicate a complete lack of understanding of the undisputed evidence we presented, as we shall endeavor to point out later.

The Order does not at any place give any intimation that these protestants had even so much as cross-examined the few witnesses presented by the railroad. The Order, in reviewing the railroad testimony, states certain things claimed by the railroad witnesses which we thoroughly exploded in minute detail by our cross-examination. None of this is even so much as mentioned. Statements of fact are made as though they had not been completely upset by that cross-examination. The whole Order, therefore, simply reeks of an interpretation of the evidence not justified by the record.

The Division Order is, therefore, defective because of its worse than incomplete recitation of the facts and its complete failure to even mention, let alone discuss, the law involved. It is defective because of its errors of omission and its complete failure to even so much as mention the statute and the things required by it. We propose to show in this petition why we are sure the Division has committed a whole multitude of errors. We do not intend to again set out the many things we have already said in our exceptions. We now specifically incorporate that document in this petition and make it a part hereof, but without completely reprinting it. We shall ask the Commission to take notice of everything there said because, as our argument here unfolds, we intend to dovetail it into what has already been set forth.

## PRINCIPLE OBJECTIONS TO ORDER

What we are about to say is not intended as a complete recitation of all the errors and defects we find in the Division Order. It is intended only to serve as a general statement of some of the main obvious defects. We now pray that the Commission refer to our brief of some 116 pages dated August 6, 1942, and to our exceptions of some 104 pages dated October 29, 1942. We specifically now incorporate those printed documents in this petition

and make them a part hereof because a much more complete discussion of the points we seek to make will be found set out in them.

The principle reasons why we object to this order are:

1. The Division has made findings of fact not supported by a single line of testimony.

2. The Division has predicated its grant of authority on a misapplication of the statute.

3. The Division has applied tests in determining whether public convenience and necessity requires the operation of a wholly improper and illegal nature.

4. The Division has based its order on things that do not exist and has omitted consideration of many controlling facts.

5. The Division has substituted the refusal of the railroad to do business with any of the protestants for proof of public convenience and necessity.

6. The Division has failed to make proper findings of both law and fact and has thereby presented an untrue picture of the nature of the proof presented.

7. The Division has failed to even note the many legal objections we made throughout the proceeding.

8. The Division has made no finding on the refusal of the Joint Board to permit us to present evidence showing bias and prejudice on the part of the applicant's witnesses.

As we indicated above, a great many other defects are to be found in the order. These we have pointed out, plus a great many more, are discussed at some length in the two lengthy documents already on file and to which reference is now prayed. In the discussion to follow, we are making no attempt to divide the material into a separate discussion of each of the objections we have pointed out above. We are, however, endeavoring to make it apparent that all of these objections are sound.

In reviewing the action of the Division, we ask that the Commission take especial note of the fact that the Division has not made a finding the protestants could not furnish the service. On the contrary, the Division has seen fit to say only that they are of the "opinion" that the protestants could not do "as well" as the applicant in that regard. We submit that is a wholly improper test. We point out further, however, that the Division could not possibly have made any stronger finding because of the fact that there is not a line of proof in the record to support any finding that protestants could not furnish the service. Neither is there any proof in the record, however, to justify the improper conclusion of the Commission.

Since this case will, obviously, be the vehicle for a test of the Commission's announced doctrine, we urge that this whole pic-

ture be surveyed anew. The order makes it clear to us that the Division is reaching its conclusion through a wholly erroneous and improper method. Apparently it has concluded that under no circumstances can a railroad receive satisfactory service from an independent motor carrier. It reaches that quite apparent conclusion on the basis of findings in other cases. It then jumps to the wholly unwarranted conclusion that the same reasoning must be applied here. It wholly ignores the fact that the applicant made no effort to prove that we could not furnish the service but, instead, had merely stated with some emphasis that it did not know about our service and would not use us no matter how excellent a job we might be able to do. In other words, the Division has substituted the refusal of the railroad to use our service for the statutory requirement. This, we submit, amounts to saying that protestants are defeated in every case involving a railroad, before the case is even started. This, we submit, is a discriminatory application of the statute and will be the principle point we shall press home.

BASIS OF THE ORDER

Since the entire Order, including the half page entitlement, occupies only five and one-half pages, it will not be difficult to hold it up to the light as one complete whole for the purpose of discovering what has led to the strange conclusion of the Division. Everything in the Order, down to the last paragraph on Sheet 4, is obviously intended to be nothing more than a recital of the factual background. We shall discuss its errors and failures later but now want to have attention focused on that part of the Order commencing with the last paragraph on Sheet 4 and extending down to the last paragraph on Sheet 5 where the Commission's findings start. It will thus be seen that approximately one page of the Order has been devoted to justification for the finding.

A careful reading will disclose that every apprehension we expressed in our exceptions have been more than justified by the loose language used in this part of the Order. In substance, the Commission has said that no independent motor carrier can ever furnish what the Order terms "coordinated" service. As we set out in our exceptions, the Division has very effectively said that a railroad is automatically entitled to a certificate paralleling its line, for the mere asking. It reaches that conclusion by saying quite without justification that the motor carrier service is some new and strange animal. Then, without reciting any fact from the record to support it, the Commission jumps to the conclusion that the:

"useful public purpose cannot be served as well by existing motor carriers."

It does not seem to occur to the Commission that this is a complete non sequitor. Nothing is recited at any point in the Order to justify the strange conclusion upon which the entire grant of authority must depend. The only useful purpose this language serves, therefore, is to make it clear both to the Commission and to any reviewing Court that the Division has definitely recognized the necessity for a showing by the applicant that the protesting motor carriers cannot furnish the service.

Since the entire grant must depend upon that language in the Order (although, of course, other defects will also operate to defeat it), it follows that unless the record contains competent evidence to support such a conclusion, the Order cannot stand upon review. We ask that the Commission now turn to our exceptions and then check the transcript. It is as clear as day that the transcript does not contain a single line of evidence to support the Division's conclusion. Let us point out what it does contain.

The record shows that the railroad at the very outset admitted that it had no knowledge whatsoever with respect to the facilities available to the public including the railroad. This was gone into thoroughly and cannot be disputed. While they did justify our argument that there has been no showing that the competing protestants cannot furnish the service, it is only part of the picture. We specifically forced the railroad witness to admit that they would not make use of any service offered by the protestants under any circumstances. We asked them if they would under any circumstance avail themselves of the service of common motor carriers operating over these routes, even if that service was better than that which they proposed. The answer was given in one short word: "No" (p. 627). No other witness for the applicant said anything about the ability of the protestants to furnish the proposed service. All of the shipper witnesses presented by the applicant, however, have admitted that they would be just as well served if the protestants furnished the service proposed by the applicant. We say all of them so testified because the stipulation under which the testimony of all but four of the witnesses was received without actually testifying specifically covers this point. We had examined the witnesses they did produce (4) to make sure that they had no preference as to the identity of the carrier who furnished the service, and the stipulation expressly provided that all of the thirty-seven remaining witnesses' testimony covered by the stipulation did include the same answers on cross examination. There is, therefore, not a single line of testimony any where in the record that can furnish the slightest support for

the conclusion of the Commission cited above from Sheet 5 of the Order. Indeed, it would be going too far to call the statement they made a finding. They merely say that they are of the opinion that the existing motor carriers cannot furnish the service as well as the applicant. As the record stands, therefore, the Division has wholly ignored this controlling point and has passed it off with a shrug of the shoulders, so to speak.

In the face of a record that does not contain a line of supporting evidence, they have said that they are of the opinion we cannot do as well as the applicant. They do not pretend to tell us the basis in fact for that opinion, nor do they say anything by way of argument to justify that peculiar statement. We now assert that the Order is defective because the finding or opinion of the Commission on the crucial question is wholly without any support in the record. To make the case stronger, we must point out that contrary to this statement by the Division, the record does contain a considerable amount of testimony showing that the protestants are in a position to and can furnish all of the service needed. The protestants went into the situation at length and stated without challenge that they were in a position to furnish precisely the sort of service described by the railroad. In the absence of some testimony to offset that claim, it is incomprehensible to us how the Division could go so far astray. When we note further that in reviewing the evidence the Division has found that at least two of the protestants were furnishing precisely the same sort of service to another railroad at the very time of the hearing, it makes us wonder whether the Division has not approved the Order without noting what it has said. It has expressly found on Sheet 4 that the Dalias L. Darling Truck Line was:

"serving the Pere Marquette Railroad in substituted service and it would serve the Pennsylvania Railroad in like manner if given the opportunity."

On the same sheet the Division has found that Interstate Motor Freight System, Inc. had:

"* * * made arrangements with the Pere Marquette railway Company to perform motor-for-rail service for that line."

How can such findings be squared with the statement that these protestants cannot furnish the service just as well as the applicant. A complete and exhaustive study of the Order fails to reveal a single fact upon which the Division could found a conclusion that the applicant was better able to furnish this service. The only thing in the Order is the single assertion that the Commission holds the opinion quoted above. We submit that this is the same fatal error that has crept into all the other railroad cases. The

Commission has arbitrarily and without reason substituted its private belief and its personal conclusions for evidence. It has concluded that something is true without troubling to inspect the record to see if its beliefs are supported by the testimony. As we pointed out in our exceptions, the applicant had the burden of showing at least two important things:

1. A genuine need by the shipping public for a truck service.
2. The complete absence of motor carriers, or inability on the part of those in existence to furnish the required service.

Every line of the testimony presented by the applicant on the score of claimed need dealt entirely with the abstract question of whether a better service could be rendered if the less than truckload traffic was transferred to trucks. In other words, the whole effort on the part of the applicant was devoted to trying to establish the first of the two propositions set out above. Not a single line of testimony, however, was presented with respect to the second of these two major propositions. While we have disputed the applicant's claim that they have proved even the first point, we want to emphasize the complete absence of testimony with respect to the second one. Proving the first one alone is not sufficient. Proving the second one was undoubtedly not undertaken because the railroad recognized the impossibility of doing so.

It is significant that the Division in its Order has not seen fit to recite a single bit of evidence dealing with the second of the two major propositions, except where they have briefly reviewed our testimony showing that protestants have the facilities and the ability to furnish the service. We think any unbiased person who reads this Order will be rather surprised at the conclusion, after reading this rather sketchy review of the evidence presented by the protestants. It seems unbelievable when we note that the Order does not, at any place, even attempt to review any evidence it might claim contradicted the proof presented by the protestants. We are sure this omission is based on the same thing that made the railroad steer clear of it at the hearing.

In substance, therefore, the Division can only justify its conclusion that protestants cannot furnish the service as well as the applicant on one ground or argument. It must have accepted the brutal refusal of the railroad to use our service as a complete and adequate substitute for evidence that we could not furnish the service. In this the Division Order is so discriminatory that we feel our statements made in our exceptions, with regard to this subject, more than justified. The Division has, without justice or reason, made the statute have one meaning as applied to a railroad applicant and a totally different one where an ordinary motor carrier applicant is involved.

General Discussion Of The Order As a Whole

The facts recited on the first four pages of the Order are not very complex. The Division gives the applicant the benefit of all doubts and devotes Sheets 1, 2 and 3 to a discussion of its testimony. It devotes a trifle less than one page to the testimony presented by the applicants, although we actually placed more witnesses on the stand and developed many more facts. The review of the applicant's evidence wholly omits any mention of the rigorous and extensive cross examination of their witnesses. It is, therefore, a wholly incorrect picture we find painted in that part of the Order upon which all of the findings must be based.

The first page recites the fact that the applicant is seeking certain described rights, and is presently operating a number of truck routes paralleling many miles of the Pennsylvania Railroad. The second sheet then points out that the applicant's stock is owned by another corporation which, in turn, is wholly owned by the railroad. There then follows a paragraph purporting to describe the proposed service in the language used by the applicant. The old phrase that the service is proposed to be

"auxiliary to and supplemental of the rail service in the transportation of less than carload freight."

is then set out.

These high sounding phrases were never defined at any time in this or any other record we have been able to read. This is rather peculiar because it will be noted that this, as well as the other rail decisions, have depended almost entirely on some marvelous benefits that are supposed to flow from service which is "auxiliary to and supplemental of" railroad service.

If repetition of undefined phrases adds strength to a case, then this case certainly has it. The only explanation of what is meant is the few sentences that follow this statement on Sheet 2. The Division again quotes from the argument of the applicant without giving credit by saying that:

"The general plan of this coordinated service is to transport such traffic by rail between key or break-bulk stations and thence by truck to the intermediate or way stations. Conversely, applicant would collect freight at the way stations and transport it to the key stations for movement beyond by rail."

These two sentences are all that are devoted to explaining the phrase "coordinated service". The language which follows on Sheet 2 points out that the termini of each of the seven connecting routes (why it calls them connecting we don't know), are large cities and that the service between Fort Wayne and Grand Rapids is frequent and the volume of tonnage is heavy as compared with

the much lighter tonnage and service to all of the other or intermediate points.

The next paragraph on Sheet 2 recites, as though it had been established without question, some claimed facts concerning the amount to be transported between some of the points. It is extremely significant that the Division does not even comment on the fact that the railroad refused point blank to give either the protestants or the Commission any figures showing precisely what tonnage had been moving or would be moved to and from each of the small towns along the way. There is nothing in the record to indicate whether all of these intermediate points would actually receive any worthwhile freight or not. All of the seven separate routes are quite obviously not in the same factual position. We sought in vain to compel the railroad to break down the figures but now find the Division upholding them in their refusal. At the same time, the Division, in the absence of proof to show that there is substantial and worthwhile tonnage to all of the points on all of the seven routes, has stated it to be a fact that there is considerable tonnage to all of the points. They have, therefore, made a finding not only not supported by the record, but one which is contradicted by the facts we developed.

The last paragraph on Sheet 2 contains a misstatement of fact that we have already tried to impress upon the Division in our exceptions. This paragraph recites in substance that the railroad will not handle any more less-than truckload freight on its rails. It does not say that directly, but implies it when it says that "peddler" card will be discontinued. On the basis of that statement, they then say that this will release freight cars for use in other trains. This we challenge. The railroad witness stated that they would continue to furnish local service by rail at the option of the shipper or consignee. No one can say, as a matter of fact, that anything will be eliminated. Certainly, even the Division admits that the train which runs the local freight will continue to operate. The next statement made in this paragraph, however, is so very wrong we cannot imagine where it came from. They make the statement:

"For every freight car eliminated the necessity for switching that car in the yards also will be eliminated as well as the attendant expense."

This is plainly a case of inventing evidence. Some vague chance testimony about how the railroad hoped to operate was presented over our objection, but even the railroad did not claim that there was going to be any such thing as a complete elimination of switching. Since they admit that the freight may continue to move by train, the Commission is not justified in finding

that, as a matter of fact, this will be true. As we have pointed out earlier, however, the elimination of expense to the railroad is not material to the case anyway. The concluding sentence in the last paragraph on Sheet 2 recites that the operations will expedite the movement of less-than-carload traffic from 24 to 48 hours. This loses sight entirely of the cross-examination whereby we demonstrated that this was a guess at the best. It also overlooks the fact that we presented positive testimony on that specific subject by men who had had experience on railroads completely contradicting that claim. We are not even accorded the right of having that testimony mentioned in this short summary of the proof.

The first paragraph on Sheet 3 claims that a railroad representative described benefits but fails to mention them. The Order then says that:

"* * * numerous shippers and receivers of freight at points on the rail line expressed a belief that this type of service would be advantageous to them in their business enterprises."

This we dispute. Four witnesses were sworn. The first one stated that the railroad, as it was presently operating, was satisfactorily meeting his needs (pp. 318–331–332). Their second witness testified that he was satisfied with the service (p. 387). The third witness stated that the service of the railroad was generally satisfactory (p. 405). The fourth witness agreed that his present service was adequate to meet his needs (p. 419). He repeated this later (p. 422). These are the "numerous shippers and receivers of freight," because they are the only ones that actually testified. The other thirty-seven will be touched on a little later. None of these four made any effort to detail any need for the proposed new service, nor did any of them tell us in any way how it would be of an advantage to them. Even the Division, however, has diluted its expression on this point by saying that these witnesses spoke only of a "belief" in that regard.

The next four paragraphs then deal with the four witnesses we have mentioned just above. Note that even the Division grudgingly admits that the first witness admitted that "present rail service is generally satisfactory." The Division concludes the last sentence of the paragraph dealing with this man by saying that he testified that a saving of 24 hours in transit would benefit him. As a matter of fact, he did not make any such positive statement. He was asked whether the speeding up of rail service would serve the convenience and necessity of his business. He answered:

"It will help us I think. Yes, sir" (p. 312).

On cross-examination, when we sought to find out why he thought it might help. We ultimately drove him to admitting that

he knew little about competing motor carrier service and that the reason he did not know was because the service he had been receiving from the railroad was good enough to take care of his needs (pps. 331–332).

The third paragraph on Sheet 3 attempts to review the testimony of their second witness. After reviewing the matter of his company's business the paragraph concludes with the statement that this witness had said that the proposed rail-motor service would be a definite advantage to his company. This witness did not make any such blanket statement. Search as you will, it will not be found that this witness even stated that the service "would be a definite advantage" to him. Even the applicant, in its review of this man's testimony on pages 48–50 of its brief of August 21, 1942, made no such claim. The stereotype question of whether this kind of service with a 24-hour saving would serve the convenience and necessity of his company was addressed to this witness. Upon cross-examination, however, we developed the fact that in so far as the needs of his company is concerned, the present rail service is satisfactory (p. 387). The Division summary of this man's evidence, therefore, is not accurate and, as in the case of all of the other witnesses, wholly omits all reference to the change of position brought about by our cross-examination.

The fourth paragraph of Sheet 3 reviews the testimony of the applicant's third witness by describing the character of the business in which he is engaged. It concludes with this sentence:

"The present rail service is too slow, and if the above-described movements could be expedited by 24 hours his particular business would be benefited."

Here is a case in which the Division has certainly gone overboard. This man stated that on one particular shipment from Milwaukee, the rail service had been slow but he admitted that, generally speaking, it had been satisfactory (p. 405). The Division wholly omits to mention the fact that this man is an employee of the railroad. It does not mention the fact that he is furnishing pick-up and delivery service for the railroad at his town. He did not even claim that there would be any particular benefit accrue to him and we challenge the Commission to place its finger on such a statement.

The fifth paragraph on Sheet 3 devotes only a few lines to the fourth and last shipper witness the applicant presented on the stand. This paragraph claims that the witness said that a saving of 24 hours would benefit his business. This witness frankly admitted, however, that his present service was meeting his needs (p. 405). We then asked a very important question on cross-

examination, which the Division had seen fit to omit from the discussion. We asked:

"Q. Would it make any difference to you as to the identity of the truck line that gives you the service that they discussed with you?

A. As to which line it would be?

Q. Yes.

A. No." (p. 421).

This question goes to the very heart of the case. We ask that particular note be made of the discussion that follows immediately below. Before leaving this witness however, may we now point out that not a single one of the 4 witnesses whose testimony the Division has reviewed, has claimed at any point that he was not presently receiving satisfactory service on the whole. Not a single one of the witnesses has said that the present available service is failing to meet his needs. Even the Division has not undertaken to review any such claim. Bearing in mind the fact that these 4 witnesses are the only ones who testified in person, we think it important for the Commission to note that none of them is represented as saying that the present service is such that he cannot get his merchandise moved in an adequate and satisfactory manner by present facilities.

It is also of considerable importance to note that not a one of these witnesses made any claim that it would be necessary for the applicant to furnish the service. Obviously, they could not do so because of their lack of knowledge. In view of the fact, however, that it is necessary for an applicant in this kind of case to show that there is no existing carrier capable of furnishing the service, we want to nail down the fact at this point that the Division has not even pretended to recite any evidence thus far even remotely concerned with the most important question in the whole proceeding.

The sixth and last paragraph dealing with the evidence presented by the appellant states that 37 other shippers' testimony was presented by means of a stipulation. The grave error in this paragraph lies in the last sentence. This reads:

"These shippers consider the coordinated service essential to their representative businesses and desire that such service be instituted."

When the Division says that these 37 shippers considered this service "essential" to their business, it is placing words in their mouths that were not used by a single one of these witnesses. Even the applicant has not had the temerity to make such a claim. The claimed substance of these stipulations will be found set forth on pages 63 and 64 of the August 21, 1942, brief of the appli-

cant. It will be most illuminating for the Commission to read those claims. Bear in mind that the applicant is certainly not slighting itself in making these claims. The only thing found in all the stipulations is the continual statement that the proposed service would serve the convenience and necessity of the particular shipper. That is a far cry from the statement by the Division that this service is "essential" to their business. It is especially true when we note the fact that our cross-examination of the fourth and last shipper witness they presented on the stand is recalled. Turning back in this document the Commission will find the citation we refer to. At page 421 this witness frankly admitted that it would not make any difference to him whether the protestants or some other motor carrier instead of the applicant should furnish the service (p. 421). The stipulation, as the applicant has noted at page 58 of its brief, was that the cross-examination of each of these 37 witness was to be taken as substantially the same as that of the 4 witnesses they did present on the stand. This means, therefore, that these witnesses must be considered as having all admitted that they would be just as well served by the protestants as by the applicant. Why the Division has overlooked this point we stressed in our exceptions, we do not know. It is regarded by us as vital. We would not have stipulated the testimony, however innocuous it might seem to be, if this had not been well understood. In so far as one major point is concerned, that part of the stipulation completely destroys any claim that these protestants could not furnish the service.

## Testimony of All of Applicant's Shipper Witnesses Erroneously Considered

We come now to another point that we think is fatal to the case of the applicant. We have pointed out in our briefs and in our exceptions the fact that the Joint Board refused to permit us to present testimony at the last hearing we still consider controlling. During the interval between the presentation of the applicant's case and the time we presented our own, we caused a rather extensive survey of traffic to be made. In the course of so doing, each of the shipper witnesses named by the applicant was interviewed. To our astonishment we discovered something of a most unusual nature. These witnesses admitted that they had testified in support of the railroad for reasons that completely destroyed both the weight and credibility of everything they had said. They admitted that they had appeared either because they were employees and compelled to do so, or because they did busi-

ness with railroad employees and had been placed on the spot when requested to appear, or for some other equally improper reason. In no case did they appear because they needed any service. We sought in vain to present the evidence we had collected on this score. It was clearly admissible on any one of several theories. It would have completely destroyed the validity of every line of shipper testimony. Since the Division has treated that testimony as of great importance, it is obvious that the exclusion of all evidence contradicting these witnesses out of their own mouths is a fatal error. The refusal of the Joint Board to permit such perfectly competent evidence is an error of major proportions. We insisted upon it from the beginning and we shall insist on it in any Court review of this Order. We are gravely concerned over the failure of the Division to even so much as mention this fact in reviewing the evidence of these witnesses. We made an offer of proof and we made every possible effort to get that testimony before the Joint Board. If it had been received, it could have only operated to destroy the validity of every claim being made based on the testimony of the applicant's shipper witnesses. We submit that this error can only be cured by a complete reopening of the case and its being reset for a complete new hearing. Justice demands that this be done. Any other course amounts to saying that even though we were possessed of competent proof, that would have destroyed every line of shipper testimony they presented, the Commission is going to shut its eyes to that fact and ride these protestants into the ground without regard for the facts.

## Protestant's Testimony

We have set forth a rather complete résumé of the testimony presented by the protestants in our brief of August 6, 1942. In order that we may conserve paper and not burden the file too much, we pray reference to pages 40 to 71 for a résumé of our proof. Since the Division has devoted practically no space to our summary of the evidence, we also ask that the Commission again review all of the pages of the transcript dealing with this proof. We presented some 24 witnesses on the stand and the testimony of some 17 additional was entered by a stipulation. Many of our witnesses testified at length about the satisfactory nature of the service the protestants were furnishing between the points involved in the application. Since the Commission will unquestionably go to the transcript to verify everything said, we shall not devote much time here to a review of that evidence.

In substance, the protestant's motor carrier witnesses testified that they could and would furnish the service described by the

railroad. These witnesses also testified that they were fully equipped to handle the business and that there was nothing unusual or out of the ordinary involved in serving this railroad. The Division has found that some of the protestants are presently furnishing service to the Pere Marquette Railroad of the same kind involved in this proceeding. In reviewing the testimony, therefore, the Commission will find that there is no dispute about the fact that we can and will furnish the service if the railroad will give us the opportunity.

## General Summary Of All Of the Evidence As Reviewed By The Division

Now that we have gone over all of the evidence presented by both the applicant and the protestants, we pause to summarize all of the testimony the Division has related as a foundation for its conclusion. It has very briefly reviewed the testimony of four shipper witnesses, after discussing the testimony of a railroad witness and the general manager of the applicant. This shipper testimony, even if accorded all the weight given it by the Division in its review, amounts only to saying that the four shipper witnesses presented on the stand have said that the institution of a motor carrier service of this general character would be of some value to them. No more than this is even claimed by the Division for the 37 shipper witnesses who did not take the stand.

Note well the fact that the Division does not recite any claimed evidence showing that it is necessary that such service be furnished by the applicant and no one else. Throughout that part of the Order which follows the review of the evidence, we find the Division quite obviously trying to say in several different ways that the applicant was best fitted to carry on the proposed service. Yet, significantly enough, not a single line of testimony has been mentioned anywhere even remotely touching upon that subject. Indeed, the review of the evidence completely ignores the cross-examination where we forced their witnesses to admit that they had no choice as to who should furnish the service. How then can the Division conclude, as it does on Sheet 5, that the existing motor carriers cannot furnish the service as well as the applicant? Where in the Order is there any evidence recited to support that conclusion? Where in the record can any such testimony be found? The answer is plain. There is no such evidence. That is the sole reason why the Division failed to make mention of such testimony.

Now, of course, this argument has left out of consideration the testimony presented by the applicants. As we have noted, even the Division has been forced to admit that some of the protestants

are furnishing the same kind of service to the Pere Marquette. Our own witnesses testified without contradiction that they thoroughly understood the kind of service the applicant proposed to furnish and that they could and would furnish that service. They testified without challenge that they were, in fact, furnishing that kind of service every day.

From a factual standpoint, therefore, even the Division has admitted that we have a record wherein there is to be found no testimony going to show that present carriers cannot furnish the service. Yet, the Division, in face of the fact that there is no such testimony, has specifically found that the existing motor carriers could not furnish the service as well as the applicant. Note well the fact the evasion of the main point. The Division has not attempted to say that the protestants could not furnish the service. They made it comparative matter by saying that we could not furnish it "as well" as the applicant. We rather strongly suspect that if a hundred carriers operate between a given set of points, all of them would not be able to furnish service on precisely the same level. We submit, however, that comparing the service of the applicant with that of the protestants is not a proper test, even if there is evidence to warrant the Division's conclusion. Since, however, no witness presented by the applicant even claimed to know anything about the character of the service of any of the protestants, how can it be possibly held that the applicant's service is superior to any possible service that might be furnished by the protestants? We think we know what has been in the mind of the Division. We believe it has decided this case on the basis of a general belief and an improper understanding of the particular facts in this case.

As we view the case as a whole, therefore, and as we go over the Division findings of fact, we are driven to the conclusion that the Division holds every one of the improper beliefs we fought against so vigorously in our exceptions. It now appears to us that the Division is trying to say, through this Order, that no independent motor carrier can possibly be permitted to furnish service of this kind for a railroad; if the railroad expresses any objection. We are now convinced that the Division is taking the position that a motor carrier not owned by a railroad cannot furnish the kind of service a wholly-owned subsidiary can furnish. On that mistaken general belief, the Division, has therefore, erroneously concluded that it is not necessary to examine the facts in a particular case to see whether or not they are wrong. In other words, the Division seems to be saying that under no circumstances can any independent motor carrier ever defeat an applicant owned or controlled by a railroad. If this is not the

substance and essence of this entire Order, then there is something we have wholly missed in reviewing it.

GENERAL DISCUSSION

In our original brief and again in the exceptions we have referred to above, we discussed all of the points suggested in the foregoing pages of this petition. In addition, we raised a number of other objections. The rather extensive discussion in those two documents, when read in connection with what we say here, will present a complete picture of the defects we think are important.

Since the filing of those two earlier documents, the Division Order on which we now seek reconsideration and oral argument, has repeated the earlier errors and added many to them. As we have pointed out earlier in this document, many things set out in the Division Order as facts will be found to lack support in the record. For example, it is beyond dispute that there is not a line of testimony in the record showing that the applicant can furnish service any better than the protestants. Neither is there any testimony to show that the protestants cannot furnish all the service required.

Other statements concerning other phases are made without there being the slightest evidence in the record to support them. The order is quite obviously based on an interpretation of the statute not at all in accord with its true meaning. It has, in our judgment, construed the statute to require one thing when applied to an ordinary motor carrier and a totally different thing when applied to a carrier owned or controlled by a railroad. Since this is discussed at length in the two documents mentioned, we shall not repeat here.

The order shows on its face that the Division has determined the question of public convenience and necessity on a wholly improper basis. In the face of admissions by the applicant that it knew nothing about existing motor carrier service, the order nevertheless proceeds to find that the applicant can better furnish the service than the existing carriers. The only basis for its conclusion in that respect is the wholly improper general belief that the railroad must own the motor carrier and that such ownership will automatically guarantee better service. Here again is a point we have discussed at length in the two documents already on file and to which we have directed the Commission's attention.

It does not seem possible to us for anyone to conclude that there is any more basis for the grant of authority than the blank refusal on the part of the railroad to use our service. The order substitutes that refusal for the proof ordinarily required of other carriers that the public convenience and necessity requires the

service. In our judgment, the Division has applied the wrong statutory test and has substituted this blank refusal for the solid proof required of everyone else. It is for that reason primarily that we say that this order is an arbitrary and discriminatory application of the statute.

The order takes no note of many important facts set out in the record. In particular, the order fails to even note the fact that we demonstrated through many witnesses that there is a wholly satisfactory service in existence serving all of the points in question. The order takes no note of the fact that on cross-examination every witness presented by the applicant admitted that his present rail service is adequately meeting his needs. Most important of all is the failure of the order to even mention the fact that the applicant's witnesses have admitted that it would be just as satisfactory to them if the railroad used our service instead of using the applicant. We think this is an omission that cannot be justified because it goes to the heart of the case.

While a great many other things could be mentioned, we name only one final defect. The Joint Board refused to permit us to present competent proof showing bias and prejudice on the part of every one of the applicant's witnesses. The failure of the Division to even mention that important point can indicate only one of two things. Either the Division did not note this fact, despite our insistence upon it, or it believes it is of no moment. If one of these two reasons does not explain the failure, then we would be forced to conclude that it has been omitted for some reason that obviously would be improper. In any event, we still insist that our point in this connection is sound and that all of the other objections made throughout the proceeding, and which we have urged repeatedly ought now to be reconsidered.

## CONCLUSION

We shall appreciate an early disposition of the issues because we think this case presents an important set of questions that ought to be tested. As we have urged in the other documents we have filed, the Commission, in other cases, has adopted rules of interpretation that have seemed to motor carriers generally to be without justification. As we have said elsewhere, this decision now makes it quite certain that the real basis for this order is the Commission's belief that independent motor carriers should not be permitted to transport merchandise offered them by a railroad. Indeed, the order makes it quite clear to us that if a railroad asks for authority it cannot be defeated by any possible showing made by carriers already in the field. The discriminatory feature of

this and similar orders lies principally in the fact that the basis for those orders seems to be a mistaken general philosophy adopted by the Commission for general application in all cases involving a railroad or its subsidiaries. We have analyzed every order issued by the Commission involving a railroad applicant at some length. We are unable to find anything in any of those orders holding out any possibility of a successful defense by an independent motor carrier against any railroad applicant. On the contrary, when all of the reasoning is carefully analyzed, it will be found to resolve itself down to a statement that, if a railroad applicant shows that it will not do business with independent motor carriers, it need show nothing more in order to receive the authority requested. Every sentence and every phrase used in the present order points in that direction. When the present order is taken apart sentence by sentence, it will be found that the Commission has simply said that while the protesting carriers have proved that they could furnish the service, the Commission being of the opinion that it adopted in earlier cases, is, nevertheless, convinced that only the applicant can or should furnish the service. The order seems so contrary to the facts, it is difficult for us to understand the mental processes whereby the Division reached its conclusion. We submit that if the record is carefully scanned, all of the errors we have pointed out will be found to be present and, in addition, a great many more will be discovered.

We respectfully pray that this matter be set down for oral argument. We think we should be given an opportunity to point out to the Commission as clearly as possible a great many facts and arguments that the individual Commissioners have not had brought to their attention directly. The screening process through which this and other documents must go has pretty effectively served to prohibit all of the members from getting a first-hand impression from what we have said. This can only be done through the medium of oral argument. As we view it, the whole future of the motor carrier industry is involved in the doctrine established by this and related cases. In addition, the proposed restrictions which the Commission seems to feel will prevent competition with existing motor carriers are absolutely meaningless and will not even come close to doing what the Commission seems to believe they will accomplish. At an oral argument we can, we believe, demonstrate many things that the printed word make difficult to get across. We pray also that the Commission reopen the matter to permit us to present proof the Joint Board refused to admit. Conditions have altered a great deal since the trial of the cause and such changes should be shown. If granted a reopening, we will present proof going to show many things contradict-

ing the beliefs expressed in the present order. Finally, we pray that the Commission will reconsider the whole matter and deny the application in its entirety.

Respectfully submitted.

INTERSTATE MOTOR FREIGHT SYSTEM,
PARKER MOTOR FREIGHT,
By K. F. CLARDY,
*Attorney for Protestants.*

Dated at Lansing, Michigan, this 11th day of November 1943.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record by mailing a copy thereof properly addressed to each such party.

Dated at Lansing, Michigan this 24th day of November 1943.

K. F. CLARDY.

1193 BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-2815 Sub No. 6

IN THE MATTER OF THE WILLETT COMPANY OF INDIANA, INC., OF CHICAGO, ILLINOIS, FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY—MICHIGAN EXTENSION

*Joint reply of applicant The Willett Company of Indiana, Inc., and Intervener, the Pennsylvania Railroad Company, to Petition of Protestants, Interstate Motor Freight System, Inc., and Parker Motor Freight for reopening, reconsideration, oral argument, and other relief*

Dec. 20, 1943

I

The Willett Company of Indiana, Inc., applicant herein, and The Pennsylvania Railroad Company, intervener herein, hereby file their joint reply to the petition of Interstate Motor Freight System, Inc., and Parker Motor Freight, heretofore filed with the Commission under date of November 19, 1943 (due date December 20, 1943) to the report and order of Division 5 under date of August 6, 1943, granting to applicant the things applied for in said application herein, as amended, and would respectfully represent and show to the Commission that The Willett Company of

Indiana, Inc., is the applicant herein and the Pennsylvania Railroad Company is intervener herein of record. That applicant is a corporation duly organized and existing under and by
1194 virtue of the laws of the State of Indiana with its principal office and place of business in Indianapolis, Marion County, Indiana, and with its operating office at 323 West Polk Street, Chicago, Illinois. That applicant is now and has continuously been engaged as a motor carrier in interstate commerce by motor vehicle since its incorporation under the laws of the State of Indiana on the 7th day of May 1934.

II

That the herein application was duly set for hearing at Indianapolis, Indiana, where a hearing was duly held on February 10 and 11, 1942, at which time applicant and intervener presented their evidence before Joint Board 23, before whom said application was set for hearing. That said hearing was duly adjourned after the receipt of said evidence and set for further hearing at Lansing, Michigan, where on June 1 and 2, 1942, the protestants presented their evidence before said Joint Board No. 23.

III

Thereafter on the 14th day of September 1942, there was issued herein a report and recommended order by Examiner Walter W. Bryan to whom said matter was referred by the Commission in which he recommended the granting of said application. To said report and recommended order exceptions were filed by certain of the protestants, to wit: Interstate Motor Freight System, Inc., Parker Motor Freight, Day's Transfer, Inc., O. I. M. Transit Corporation, Wolverine Express, Inc., Norwalk Truck Line Company, Norwalk Truck Line Company of Indiana, Inc.
1195 A reply to said exceptions was duly filed by applicant and said intervener herein on the 16th day of December, 1942.

IV

Thereafter Division 5 duly issued its order under date of September 25, 1943, granting to applicant the things prayed for in its application as amended.

The time for filing petitions to said order of Division 5 was duly extended upon request of one of the protestants, to December 10, 1943, to which a petition was filed by only two of the protestants, namely, Interstate Motor Freight System, Inc., Parker Motor Freight, on November 11, 1943, on which date, said two protestants

filed their petitions for reopening, reconsideration, oral argument, and other relief, to which the herein joint reply by applicant and intervener is respectfully addressed.

## V. Historical Matter

The applicant and intervener feel that at the outset the Commission should bear in mind that the applicant is an existing motor carrier engaged in interstate commerce and is an existing motor carrier the same as protestants are existing motor carriers and is entitled to be considered as an existing motor carrier the same as protestants. The Pennsylvania Railroad has used applicant extensively in this station-to-station substituted truck service for it and has employed it to perform this service, practically blanketing its entire system from the Indiana-Ohio State Line west
1196 to St. Louis in Indiana and Illinois, with Chicago on the north, Louisville, Kentucky, on the south and East St. Louis, Illinois, on the west, commencing in 1933.

The applicant has been declared to be a common carrier by motor vehicle of commodities generally in interstate commerce by the Commission under and by virtue of its certificates of convenience and necessity heretofore issued to it under Nos. MC-2815 ("grandfather") No. MC-2815 (BMC-10), and Nos. MC-2815 Subs 1, 2, 3, 4, 5, 7, and 8; that in said business applicant is now and has at all times since its incorporation been engaged as such motor carrier in line haul operations in substituted service in the transportation of less than carload freight for the Pennsylvania Railroad between points on the lines of the Pennsylvania Railroad; that all of applicant's service authorized in said certificates and the service applied for herein is limited to service which is auxiliary to and supplemental of the rail service of the Pennsylvania Railroad, moving on the bills of lading of the Pennsylvania Railroad and subject to the tariffs of said railroad. The applicant has no relationship with the public as far as tariffs, bills of lading, etc., are concerned. In said service it performs no transportation service directly for the public. It only performs this service for The Pennsylvania Railroad.

## VI

Applicant is a wholly owned subsidiary of The Pennsylvania Railroad Company. The intervener, The Peninsylvania Railroad Company, is a party of record to the herein proceedings and
1197 has among other things participated in the hearing, assisted in examining and cross-examining witnesses, and in the preparation of and filing of briefs and replies.

The intervener, The Pennsylvania Railroad Company, is vitally interested in these proceedings as is shown by the evidence herein and briefs and replies heretofore filed.

The schedules and operations of applicant are entirely dependent upon the schedules and operations of the rail service of the Pennsylvania Railroad, and it is vital and essential in the performance of the service herein applied for that the intervener secure the service of a motor carrier which can and will meet the truck schedules required by the intervener in the performance of this service.

VII

That we may at the outset get a full picture of the herein proceedings and the magnitude of the present operations of applicant for intervener, The Pennsylvania Railroad Company, we set forth the present authority which the applicant has and which is being used in performing this same type of service for the Pennsylvania Railroad.

In each and all of the hearings held under the applications and certificates hereinbefore referred to, various protestants bitterly fought the granting of the applications. The same type of opposition has prevailed in all of the hearings and in each and all of the certificates there has been the same finding in the orders granting applicant the authority sought as in the instant application. It is exactly the same type of service which is now being rendered under the present certificates hereinbefore referred to as having been issued to the applicant, that the intervener desires the applicant herein to perform over its rail lines in the State of Michigan north from Fort Wayne, Indiana.

1198

On the 5th day of January 1942, under No. MC-2815 (BMC-1 "grandfather" application), applicant was granted authority by certificate to operate in such substituted service for the Pennsylvania Railroad over the following routes: Logansport to Columbia City, Fort Wayne to Plymouth, Fort Wayne to Butler, Fort Wayne to Monroeville and Indiana-Ohio State line.

The routes covered therein are not involved in the herein application, they are only referred to for the purpose of showing the connecting authority which applicant has and showing its routes covering certain other portions of the Pennsylvania Railroad.

VIII

On the 3d day of June, 1941, under MC-2815 Subs. Nos. 3, 4, and 5, the applicant was granted authority by certificate to operate in such substituted service for the Pennsylvania Railroad over the following routes:

Sub No. 3: Union City, Ind., to Bradford, Ohio.

Sub No. 4: Chicago, Ill., to Logansport, Indiana, Chicago, Ill., to Plymouth, Indiana, Terre Haute, Ind., to Decatur, Ill.

1199 Sub No. 5: Logansport to Effner, Indiana, Logansport to South Bend, Indiana, Terre Haute to Frankfort, Indiana, Columbus to Cambridge City, Indiana, Indianapolis to Shelbyville, Indiana, Indianapolis to Rushville, Indiana.

The routes covered therein are not involved in the herein application, they are only referred to for the purpose of showing the connecting authority which applicant has and showing its routes covering certain other portions of the Pennsylvania Railroad.

## IX

On the 14th day of February 1940, under No. MC-2815 (BMC-10) and Subs 1 and 2, applicant was granted authority by certificate to operate in such substituted service for the Pennsylvania Railroad over the following routes:

MC-2815 (BMC-10): Columbus to Madison, Indiana, Effingham to East St. Louis, Illinois, Terre Haute, Indiana to Effingham, Illinois, Indianapolis to Terre Haute, Indiana, Indianapolis, Ind., to Louisville, Ky., Logansport to Union City, Indiana.

MC-2815 Sub No. 1: Fort Wayne to Richmond, Indiana, Logansport to Richmond, Indiana, Indianapolis to Richmond, Indiana, Columbus to Madison, Indiana (mail and express only).

MC-2815 Sub No. 2: Indianapolis to Logansport, Ind., Indianapolis to Vincennes, Ind.

The routes covered therein are not involved in the herein application, they are only referred to for the purpose of

1200 showing the connecting authority which applicant has and showing its routes covering certain other portions of the Pennsylvania Railroad.

## X

On the 28th day of May 1943, under No. MC-2815 Subs No. 7 and 8, applicant was granted authority by certificate to operate in such service in substituted service for the Pennsylvania Railroad over the following routes:

MC-2815 Sub No. 7: Anderson to Matthews, Indiana.

MC-2815 Sub. No. 8: Logansport to Fort Wayne, Indiana (alternate routes).

The routes covered therein are not involved in the herein application, they are only referred to for the purpose of showing the connecting authority which applicant has and showing its routes covering certain other portions of the Pennsylvania Railroad.

## XI

And now we will direct our attention specifically to the matters set forth in the petition for reopening, reconsideration, oral argument, etc., filed by two of the protestants under date of November 11, 1943, whose date of service by counsel for said protestants was certified to as of November 24, 1943. By the rules of the Commission the date for filing reply thereto expires on December 20, 1943.

To begin with, the petition to which this reply is addressed is of the same type and character of the other
1201 pleadings filed hereinbefore by said protestants. It is not arranged in any order or sequence but is a rambling disconnected attack on the order issued by Division 5. In justice to the protestants we must say that this was how they intended it, because on page 4 of the petition they say,

"In the discussion to follow we are making no attempt to divide the material into a separate discussion of each of the objections we have pointed out above."

It is difficult to conceive of any objections in law or mechanics which protestants have omitted. They do not only include the matters set forth in the petition but they ask that all of their briefs and exceptions heretofore filed be made a part of the present petition.

Applicant and intervener would therefore also request that their briefs and replies hereinbefore filed be made a part of and considered as a part of the herein reply.

At the outset on the first two pages of their petition the protestants complain that the order is too short; at another place the complaint is that not enough space in the order has been allocated to the protestants' evidence. At another point they complain that too much space has been allotted to a discussion of the applicant's evidence. These protestants seem to feel that the space element had a great deal to do with and was a controlling element in the order of Division 5.

Complaint was made that the order did not contain argument to support the finding; at other places criticism is made that there was not a line of evidence to support the findings, and
1202 apparently in others there was too much to suit the protestants; complaint was made that Division 5 in the order did not discuss the law and that it even failed to mention the Statutes. Well, we have looked in vain in this petition for some discussion of the law or the Statutes and find its pages are vacant in that regard. Criticism was leveled at Division 5 for a complete lack of understanding of the undisputed evidence in the case;

then there was a very modest claim that protestants had thoroughly exploded in minute detail all of the "railroad evidence" in the case. Complaint is made that none of this explosive factor was mentioned in the order. Claim is then made that statements in the order were recited as if none of these matters had been "completely upset by the cross-examination of protestants." In fact, one of the principal claims made in the petition pertained to the devastating all-destroying effect of the protestants' cross-examination. Very frankly, applicant and intervener were very well satisfied with their cross-examination. In the narrative of the evidence which we set forth in our original brief we not only set out in detail a narrative of the evidence on direct examination, but we also set out the cross-examination of protestants. We were very well pleased with the assistance which we received from this cross-examination. If by any chance on direct examination we omitted a point it was sure to be brought out in our favor on cross-examination. Then the complaint was made that the order was incomplete in its recitation of the evidence; the order was charged with "reeks of an interpretation not justified."

1203 Naturally the foregoing thunderbolts which were leveled at the order do not deserve any reply and they will not receive it. All of the charges were directly or indirectly made in all of the other pleadings which have been filed by protestants herein, and they were verbally blasted forth at the hearing. It is apparent that at the hearing the Examiner and the Board Members paid no attention to them; it is equally apparent that no attention was paid to this type of criticism by Division 5 in writing its order, and we do not believe the full Commission will take time or space to even mention them.

The main criticism and complaint which protestants have leveled at the application and the orders is that the law which is being followed by the Commission in this class of cases is utterly and completely at fault. If this were some new or novel question involved and was being raised for the first time, it seems to us that one would be justified at a hearing and in pleadings in taking the opposing these propositions as decided by the Commission and the Courts. At the hearing a great deal of time and in our judgment useless time, was taken by protestants in attacking the law which is favorable to the applicant and which has been decided by the Commission and the Courts over a period of years as pertaining to this class of cases. There are more than one hundred cases which have been decided by the Commission and the Courts establishing the fundamental law favorable to applicant involved in this application. And yet at the instant hearing and in the pleadings briefs, etc., filed by protestants, their main bur-

1204 den has been an attack upon the position of the Commission and claiming that they are wrong in all of their decisions. This in turn, of course, occupied a great deal of the time and attention of the applicant and the intervener in having to meet these time consuming, immaterial objections which have been repeatedly made by these protestants after so many decisons to the contrary. Naturally complaint cannot be made against protestants stating positions and taking exceptions to the rulings of Examiners, Joint Boards, Divisions and the Commission, to say nothing about the Courts, but haven't we gone a considerable extent in the instant proceedings? Certainly every one has been compelled to exercise a great deal of patience and restraint in meeting the unjust criticisms not once but dozens of times.

Many other frivolous and unsound criticisms are leveled. The Division is charged with applying improper tests; a statement that a railroad gets a certificate simply for the asking; a charge that the order is wholly without any support in the record; that "it makes us wonder whether the division has not approved the order without noting what it has said." Division 5 is charged with wholly ignoring one of their controlling points, in passing it off with a shrug of their shoulders. A charge is made on page 10 that "the Commission has substituted its private belief and personal conclusions for evidence, and not troubling to examine the record." Then on page 17 a final thrust is made at the decision by charging Division 5 with having "gone overboard."

1205 Applicant's Shipper Witnesses

In applicant's brief filed August 21, 1942, herein it made a thorough review and concise narrative of all of the evidence. This is found in applicant's brief at pages 7 to 103.

At pages 7 to 43, of the brief both inclusive and pages 66 to 69, is set forth in narrative form both direct examination and cross-examination, the testimony of three company witnesses who testified for the applicant as follows: Mr. E. M. Christie and J. S. Symmes representing the Pennsylvania Railroad and Mr. J. P. McArdle representing the applicant.

At pages 43 to 66 of the brief, is set forth a narrative of the direct and cross-examination of applicant's shipper witnesses.

And then we gave a review of protestants' witnesses, both direct and cross-examination in the brief from pages 70 to 103.

We believe that a casual reading of this review of the evidence contained in our brief will answer each and every one of the criticisms leveled at Division 5 in their analysis of the evidence. There are quite a number of places in the petition where protestants

claim there was not a line of evidence on certain propositions. Each and all of these criticisms are baseless. In the arguments of protestants in their petition, at no time do they discuss the matters which were brought out on cross-examination of protestants' witnesses, and their criticism does not take into consideration any of the evidence which was developed by protestants in their
1206 direct examination, which was favorable to the applicant; certainly they do not take into consideration any of the cross-examination of protestants' witnesses developed by applicant. This case cannot be decided by just picking out the direct examination of certain witnesses and ignoring all of the rest of the record. Time after time protestants claim there was not a line of testimony covering certain portions of the report. As stated before, we believe a casual reading of this analysis in our brief of the evidence alone will answer the criticisms of protestants.

On page 15 of the petition protestants want the Commission to understand that all of the testimony of the shipper witnesses of applicant amounted to nothing and that the "benefit" which were testified to by these witnesses should be limited to that of four witnesses which are claimed by protestants to be controlling, alone. Protestants claim that the substance of this testimony is to the effect that the first shipper witness testified that generally speaking the railroad service was satisfactory, that the second witness stated that he was satisfied, that the third witness stated that the service was generally satisfactory and the fourth that the present service of the railroad was adequate. This criticism of course is not well founded.

The impression would be left by protestants with the Commission that the Commission should pay attention to only the testimony of the four shipper witnesses of the applicant who actually testified in person and that the stipulation entered
1207 into by all parties of record regarding the 37 witnesses of the applicant who were at the hearing and whose stipulations were entered of record should be disregarded and should be placed in the category of "also attended." In the analysis of the stipulation regarding the 37 witnesses protestants analyzed and discussed their testimony without taking into regard the stipulation regarding the agreed portion of the stipulation pertaining to the cross-examination of these 37 witnesses.

We made a careful examination of the testimony of all of the four witnesses of applicant and summarizes it in our brief. The names of these 37 witnesses together with their position and the company with which they are connected, with transcript reference is set forth in our brief at pages 59 to 63, and then at pages 63 and

64 is set forth a substance of the direct examination which is followed on pages 64 to 66 with a careful and minute summary of the cross-examination made by protestants of these 37 shipper witnesses of applicant.

For some reason or another in all of their discussions the protestants ignore this cross-examination of these 37 witnesses and they do not take it into consideration at any point in their brief, exceptions, or petition.

The stipulation at the hearing was to the effect that the substance of the cross-examination of the four shipper witnesses who actually testified should be considered the cross-examination of the 37 witnesses who testified by stipulation.

There seems to be the opinion on the part of protestants that this testimony of these 37 witnesses should be treated
1208. lightly and should not be given the same consideration as the other witnesses, who testified on behalf of the parties. This, of course, is an erroneous attitude. The entering of the stipulation was as much of a benefit to the protestants as it was to the applicant in the saving of time. Only two days were allotted at Indianapolis for this hearing and by the time we had examined the first three company witnesses and the first four shipper witnesses for the applicant it became the practical proposition as to what we should do regarding the testimony of the other shipper witnesses and we did what is commonly and ordinarily done under such circumstances, we entered into a stipulation regarding the evidence of these witnesses in attendance who did not have the opportunity to be personally examined. Incidentally, the protestant witnesses who testified at Lansing at the adjourned hearing by stipulation should be considered the same as any other witnesses who testified on behalf of the protestants. We have not, and we do not intend, to speak disparagingly of those shipper witnesses who testified for the protestants by stipulation.

On page 15 of the petition, protestants stated that none of the applicant's witnesses testified that the proposed service would be of any advantage.

Witness number one, Claude H. Catoh (applicant's brief pages 43 to 47) gave testimony which was conclusive along this line and at variance with the statements of protestants. See page 48:

"If this particular rail-truck service is instituted and it
1209. will expedite the movement of our Pennsylvania Railroad freight 24 hours, it will be of benefit in our business (Tr. 312); and it will serve the convenience and necessity of our particular business; it will help us (Tr. 312). We would like to have that service (Tr. 312–313)"

and then in the transcript, page 319, this witness stated that the service of the railroad and all of the other truck lines was adequate

"Unless they could improve on the service in some way or another, of course."

Witness number two, M. L. Burton, testified among other things that they make shipments to all of the 48 States over the Pennsylvania Railroad. We specifically refer to page 50 of our brief of the direct examination of this witness wherein he said,

"If this particular service is instituted and if they thereby give us an expedited service of 24 hours through this rail-truck service of the Pennsylvania Railroad and The Willett Company, that will serve the convenience and necessity of our company (Tr. 351-352). We are confronted with the fact that we have competition; we are located in Michigan and our competition is located in the east and around through Illinois; and 24 hours of course will make a day, and nowadays people want things when they want them. They do not want to wait, and if you can get our shipments in 24 hours quicker, why that is going to help our business. The company is going to demand that I get them there the quickest way I can, and the customers are going to demand that I get them out the quickest way I can, and we would like to have this expedited service (Tr. 354)."

And then as a part of this all consuming and devastating cross-examination claimed by protestants, to contain the "knock-out punch" we refer to pages 52 and 53 of our brief for the beneficial testimony to applicant developed by protestants,

"My understanding of this proposed service is the Pennsylvania Railroad will pull the freight on the railroad as far as it can and then when it gets to a place where it is slowed up, like between Kalamazoo and Grand Rapids, where our local train runs one day north and the next day south, the truck will speed up that service because we will get one truck north and one truck south every day rather than every other day (Tr. 364). As far as our interest is concerned in this proposed service, it is that we need a 24-hour speeding up of the service (Tr. 367). In other words, we do not care whether they actually get it in there late, so that it could not reach the train, to make the connection, or not, but if they will speed up the service so far as the movement of any particular shipment is concerned, that is what we request (Tr. 368)."

"We are interested in seeing the railroads speed up their service (Tr. 378). Even if the supposed truck out of Kalamazoo had nothing to do before it got to our city, even if it made the 4:00 o'clock schedule it would not pass us on that day because the truck

would drop the freight at the railroad station and we would pick it up at the railroad station the next morning (Tr. 370)."

"The Pennsylvania Railroad told us they would speed up our shipments reaching Plainwell by 24 hours and that is all we are asking for (Tr. 391)."

It is well to keep in mind that this cross-examination becomes part of the cross-examination of all of the 37 shipper witnesses stipulated on. Also keep in mind that protestants claim that there is not a line of testimony in the record showing that any of these shippers have anything more than a desire for the service, that they do not need it, and that it will not be of any benefit to them, and their claim is that about the only thing is a wish or a desire. This claim, of course, along with so many of the others, is absolutely baseless.

The testimony of our shipper witness number three, Edward F. Zinkel, is summarized in our brief at pages 53 to 56. On page 55 of our brief we quote from this witness' testimony:

"If this service is rendered it will serve the convenience and necessity of our business and we would like to have it instituted (Tr. 399–400)."

1211 And on the page as another example of protestants withering cross-examination, which actually is of benefit to the applicant, and which must be considered as a part of the cross-examination of the 37 shipper witnesses of applicant, is the following which we set forth on page 55 of our brief:

"The present service I am receiving from the Pennsylvania Railroad is not satisfactory, it is too slow (Tr. 405)."

And yet protestants would have the Commission believe that every one of the witnesses of the applicant were satisfied entirely with the service of the Pennsylvania Railroad.

The testimony of applicant's shipper witness No. 4, George M. McDowell, is set forth in our brief at pages 56 to 58; this witness testified that

"If this service is instituted as explained to me and as I have indicated, it will serve the convenience and necessity of my business and would like to have this truck service instituted, and if it is instituted will continue to use the service of the Pennsylvania Railroad (Tr. 417–418)."

The testimony of these 41 shipper witnesses completely established a need for the proposed service, a desire for it, the value and reason for wanting it, and definite statement that they would use it if it were instituted.

In considering the findings in the order of Division 5, it is proper and essential that we take into consideration the testimony of all of the witnesses who testified at the hearing.

In light of what has been said, and the analysis made of the testimony, isn't it rather far fetched, to say the least, to make a claim that the testimony was undisputed and all in favor of the protestants?

1212 Auxiliary and Supplemental

Protestants object to that part of the order providing that the service shall be

"Auxiliary to and supplemental of rail service in the transportation of less than carload Freight."

Protestants at page 12 of their petition find fault with this phrase. They call this a "high sounding" phrase which has never been defined at any time in this or any other record which they have been able to read. They then criticize this order of Division 5 and say:

"This as well as all other rail decisions, have depended almost entirely on some marvelous benefits that are supposed to flow from service which is 'auxiliary to or supplemental' of railroad service."

The company witnesses testified at length in describing in detail the manner in which this auxiliary and supplemental service was operated. There is no mystery to the meaning of such ordinary words as "auxiliary" and "supplemental," and it would seem that it was frivolous to make a criticism of this order by reason of the fact that it describes the service as being "auxiliary to and supplemental of." Auxiliary, among other things, is defined by Webster as being "conferring aid or support; helping; aiding; assisting; subsidiary." Supplemental is defined by Webster, among other things, to be "an addition to anything, by which it is made more full and complete; additional."

The applicant and intervener in their respective briefs have cited and quoted from so many decisions which have gone into this matter of auxiliary and supplemental service so com-
1213 pletely that we are not going to take more space at this time to discuss this criticism of protestants, except to finally say the criticism is unjust and frivolous.

Tonnage

At the hearing Mr. E. M. Christie, witness for applicant presented an exhibit which elaborately went into the question of tonnage over each and all of the routes sought by the application. On direct examination and cross-examination he amplified this tonnage in detail. Counsel for protestants were confused, or were trying to confuse the issues by using the terms "less than

carload freight" and "truckload freight" interchangeably. They tried to have the witness break down his tonnage in truckloads, and to get him to prepare for them an exhibit different in type and form than the one which was presented. A great deal of time was consumed at the hearings in these unjust requests upon the part of protestants to secure additional data from Mr. Christie in the nature of exhibits. Complaint was made that the breakdown of tonnage was not made minutely by each town as was the desire on the part of the protestants. Complaint is made on page 13 of the petition by protestants that no comment was made in the order regarding this situation. No comment was necessary. The ruling of the Joint Board at the time of the hearing was entirely within the rules. It is to be remembered that at the hearing applicant informed protestants that if they were willing to pay for the expense in preparing additional exhibits of the type and kind they desired, he would gladly secure the
1214 same for them, but they were unwilling to meet the expense.

Now they claim that the responsibility was upon the part of applicant to spend hundreds of dollars in preparing exhibits for their use and benefit. Mr. Christie testified at great length and in detail regarding the question of tonnage.

The odd part about this entire situation is that with one breath the protestants claim that some damage will be sustained by them if this application is granted. The only thing that is attempted to be handled by the applicant upon the granting of a certificate herein is less than carload freight mostly to intermediate cities and towns along these routes. It is a matter of common knowledge that the intermediate towns have very inadequate service; that old line truck companies have very few peddle runs serving the small communities. The protestants' witnesses upon the stand testified to the fact that they had practically no package freight for these small towns along these routes. How is it possible then for them to have any complaint when the railroad is not trying to handle protestants' small amount of L. C. L. freight, but is trying to secure one of its own subsidiaries to handle L. C. L. freight which it already has. T' is business is trying to preserve?

Complaint of the protestants in this regard is unfounded and if they had been willing to pay for the exhibit it would have been furnished them.

## Savings and Economy

At one place on page 14 and another on page 15 of the petition, protestants complain that the reference in the order
1215 to savings of switching expense is erroneous. They claim that the reference to saving on switching is "plainly a case

of inventing evidence" and that there is some vague testimony regarding this question only. On pages 14 and 15 they claim that the "elimination of expense to the railroad is not material in this case anyway."

This criticism is in line with the position taken by the protestants at the hearing in which they objected to any testimony along this line, and were over-ruled.

In our briefs and replies we have gone to great length in setting forth quotations from many of the cases granting authority in like situations, and in practically every one of them there is set forth in the quotation, reference to the holding of the Commission that one of the elements in these cases is the savings in expenses to the railroad. This is a vital point in this class of cases. It has been admitted in evidence in all of them as it was admitted in the instant case.

Mr. Christie testified "there will be a reduction in operating expenses to the Pennsylvania Railroad by reason of the rail-truck operations (Tr 522)." These savings were described by him as follows: Savings in car-miles, overtime, locomotive expenses, stowing of freight, yard switching, second handling of freight, box cars used, and engine expense.

In their petition, protestants attempt to take the position that this savings is not material, and that there was no showing that there would be a complete elimination of switching. There was no claim by Mr. Christie in his testimony that there
1216 would be a complete elimination of switching charges, or a total elimination under any of the other items in his testimony. His testimony was to the effect on switching that "by reason of the elimination of the waycar on the local freight train there would be a savings in operating expenses by reason of waycars being taken off." He described in detail the operations of a local freight train with a waycar on it.

Under the heading "Economy of Operations" we discussed this subject in detail in our reply of December 16, 1942, when a large number of quotations from authorities were set forth at pages 75 to 80.

Expedite

On page 15 of the petition protestants claim that their devastating cross-examination showed that the expedition of freight from 24 to 48 hours was only a guess, and that the testimony of their expert railroad men completely contradicted the testimony of the applicant's company witnesses.

In light of the fact that the Commission has had before it hundreds of cases of this type, and has made extensive investigations into this type of service over a long period of time, it therefore

understands the operations of railroad trains and the movement of freight in and out of railroad freight houses in cities such as Fort Wayne, Indiana, and Grand Rapids, Michigan. It understands how the railroad trains are "worked" in such places, and knows that it is a common practice among railroads to lose 24 to 48 hours in handling freight at freight houses in this type of service.

1217 There is the temptation to review the evidence in this case in detail, but in light of the knowledge which the Commission has, we will refrain, and refer to the record.

Suffice it to say, however, Mr. Christie, who is an experienced railroad employee and executive of many years standing testified to these matters in detail, in showing how the freight trains operate into such cities as Fort Wayne and Grand Rapids, and how the freight cars are handled at the freight houses in the transfer of freight at such points and in the necessary loss of approximately 24 hours and in some instance 48 hours and more. He detailed the instances where 48 hours and more are lost by reason of tri-weekly operations. He also explained in detail how the operation of this truck on the schedules proposed would save from 24 to 48 hours or more. This testimony is absolutely undisputed except for one of the witnesses of protestants. The reading of his testimony demonstrates without the necessity of cross-examination that he knew nothing about the operation of the railroad, and it is apparent that this view is taken by the Examiner, the Board members and Division 5.

There are many places in Mr. Christie's testimony where he discussed this question.

## Applicant's Proposed Service Will Serve a Public Need and Be in the Public Interest

We have hereinbefore referred to the objections of protestants in their petition and have made reference to them.

1218 However we specifically refer the Commission to applicant's reply of December 16, 1942, herein at pages 56 to 65 wherein we cited and discussed quite a number of decided cases on the point.

We also refer to the reply of the same date of intervener The Pennsylvania Railroad Company herein. Intervener's said exceptions are not lengthy; but the discussion is pertinent and a large number of cases are cited on all of the propositions referred to herein.

## New Operation

Complaint is made by protestants in their petition that by Division 5's order it assumes that this type of operation is some "new or strange animal."

We have discussed this matter at length in our reply of December 16, 1942, at pages 65 to 69 wherein we have made comment and cited pertinent cases.

Unity of Control to Expedite

In our reply of December 16, 1942 under this heading we discussed this subject, pages 69 to 71.

Adequate Motor Carrier Service Available

In our reply of December 16, 1942, at pages 71 to 75 we discussed this matter with citations of authority.

This is the main point of complaint by protestants. This seems to be the main bone of contention. We will make reference under the subject of "Jurisdiction" to this point later herein, to the effect that the commission has no jurisdiction in cases of this type
1219 to compel coordinated service between carriers by rail and carriers by motor vehicle, and that such can only be accomplished through voluntary cooperation.

The record is ample and abundant on the proposition that for the Pennsylvania Railroad to have it various lines in Michigan properly covered by protestants it would require a large number of them to perform the service, and each of them would have to secure additional authority before they could serve all of the towns along the railroad in Michigan.

Protestants lose sight of the fact that the applicant, The Willett Company of Indiana, Inc., is an existing motor carrier the same as the protestants. They seem to lose sight of the fact that the Pennsylvania Railroad has this type of service in operation blanketing its operations west of the Indiana-Ohio State Line in Indiana and Illinois and to Louisville, Ky., and that all of that operation is being carried on under authority of this Commission, by the applicant. None of the applicants are performing any of this type of service for intervener. The applicant is engaged exclusively in this type of business; the protestants are not. Its entire operation is keyed to one type of service, namely transporting for the Pennsylvania Railroad. It understands the problems of the Pennsylvania Railroad. It has had long years of experience at it. It is fundamental that applicant can handle the business more economically than a large number of competing motor carriers. As testified to by the applicant's witnesses the Pennsylvania Railroad desires this service applied for herein to be handled
1220 by the applicant over these seven (7) routes applied for in conjunction with the other twenty-five (25) routes now operated by applicant for it making one entire unified opera-

tion under one company. It has eighteen reasons why it desires this type of service to be handled by the applicant, to which the protestants objected. The objection was sustained. Clearly this ruling of the Joint Board was erroneous as this type of testimony has been admitted in every other case that we have presented. And now the protestants are complaining that the intervener has no reasons for employing the applicant over the other existing motor carriers. They themselves objected to the introduction of evidence which was clear and conclusive along that line and which was made clear by an offer of proof by applicant at the hearing.

It requires no expert testimony on any point to establish the proposition in our judgment that this applicant in conjunction with its other operations over the twenty-five (25) routes described in the testimony blanketing the Pennsylvania Railroad in Indiana, Illinois and Kentucky can be operated more efficiently, economically and satisfactorily not only to the railroad but to the patrons of the railroad.

Furthermore the railroad is of the opinion that instead of being a benefit to it if it were compelled to use the services of the competing motor carriers, it would be a decided detriment. This was demonstrated by one of protestants' witnesses who stated that they were under contract with the Pere Marquette to render a service of this type over a small route for the Pere Marquette
1221 in Michigan. This witness let slip a remark to the effect that they had to notify their solicitors not to attempt to solicit the freight of the Pere Marquette for themselves. Here we quote from his testimony: "But I have talked to the drivers and we have got to be very careful about soliciting freight away from the Pere Marquette Railroad (Tr. 1014)." All of the objections of protestants along this line are frivolous and not in line with the decisions in the many other cases decided by the Commission.

Here is one of the most important bits of testimony in this case. It demonstrates the actual danger to the railroad when it intrusts its freight to a competitor—whether rail or truck. Of course the truck operator had to instruct his agents not to take away the business of this railroad and keep it for itself. The Pennsylvania Railroad does not desire to have its freight taken away from it by competing truck lines in this manner. When it employs its subsidiary, the applicant, it is absolutely safe—its business is not taken away from it.

We call attention to our reply of December 16, 1942 where we cited and discussed a number of important cases, at pages 80 to 84 under the heading "Improved service and division of traffic."

Necessary To Deal With Several Independent Motor Carriers

Under this heading we discussed this subject in our reply of December 16, 1942, at pages 84 to 87.

Duplicate Service

In our reply of December 16, 1942, at pages 92 to 96 we
1222 discussed this subject in detail.

Jurisdiction

In our reply of December 16, 1942, at pages 104 and 105 we discussed this subject and cited decisions thereunder with quotations. We also suggest the reading of intervener's reply of December 16, 1942, with the numerous decisions set forth therein on the general subject.

Convenience and Necessity

In our reply of December 16, 1942, at pages 99 to 103 under this heading we discussed at length with citations and quotations, other decisions of the Commission. We also commend the reading of intervener's reply of December 16, 1942.

Protestants object to the standard set forth in all of these decisions on this subject. They claim that the decisions are all wrong. We do not believe there is anything further that we need say along this line except that the entire position of protestants is groundless. They have not cited a single decision which is contrary to the hundred or more decisions in conformity with the rule followed by the Commission in granting applicants authority in this and in other like cases.

Reopening

Protestants have made request for the reopening of this case. In no instance have they followed any of the rules of the Commission pertaining thereto. They have had every opportunity to produce witnesses and introduce testimony. The original hearing was held at Indianapolis in February, 1942.
1223 The hearing was adjourned until sometime in June of the same year, and during the several months interval they had all opportunity to develope their evidence. They had a hearing of two days at Lansing on June 11 and 12, 1942, at which time they presented their witnesses. They have made no showing at

ay place that they have additional testimony, nor have they set ut what the substance of that testimony would be. At the hear- ng they attempted to impeach the testimony of witnesses in a way ot authorized by the Rules of Evidence. Their offer of proof- as inadequate and meaningless. Every opportunity was given rotestants to bring in their testimony and be heard. This case as been delayed long enough. We respectfully submit that the bjections of the protestants are groundless.

## Oral Argument

Oral argument has been requested by the protestants at each opportunity they have had to discuss and bring this matter. Protestants have in no wise complied with the rules of the Commission in presenting their pleas. Nothing could be gained in our judgment by another delay for the purpose of oral argument. The briefs, replies and petitions have been amply supported by careful analysis on their side, and what could be gained, except delay? The protestants in their petition "want to point out as clearly as possible a great many facts and arguments that individual members have not had brought to their attention directly." This is a novel reason for wanting oral argument and delay.

Another reason advanced by protestants is "the whole 1224 future of the motor carrier industry is involved in the doctrine established by this and related cases." This has not been reflected in the evidence in any of the cases before the Commission and the Commission has gone to unusual length in protecting independent motor carriers.

Then the final plea on oral argument is to the effect that "many things the printed word makes difficult to get across."

In all seriousness, of course, the applicant and intervener have no objection to oral argument in this or any other case. We do feel, however, that it is an imposition to make this request in the herein matter after all of the delays which we have had and in light of the long line of decisions governing the law in these cases. This request should be overruled.

## CONCLUSION

Wherefore, Applicant and intervener respectfully say that each and all of the matters set forth in the petition herein are unfounded and without merit and should therefore be overruled. Applicant and intervener respectfully pray that its application be granted

in its entirety and that a certificate of convenience and necessity as prayed for be granted to applicant.

Respectfully submitted.

THE WILLETT COMPANY OF INDIANA, INC.,
HARRY E. YOCKEY,
By Harry E. Yockey, *Its Attorney.*
THE PENNSYLVANIA RAILROAD COMPANY,
OSCAR LINDSTRAND,
By Oscar Lindstrand, *Its Attorney.*

EARL W. MUNSHAW,
KIRKWOOD YOCKEY,
*of Counsel.*

December 19, 1943, 1250 Consolidated Bldg., Indianapolis 4, Indiana.

1225 CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in the instant proceedings by mailing first class, postage prepaid, a copy thereof, properly addressed to each such party.

HARRY E. YOCKEY,
Harry E. Yockey,
*Counsel for Applicant.*

Dated at Indianapolis, Indiana, this 19th day of December 1943.

1226 At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of February, A. D. 1944.

No. MC 2815 (Sub No. 6)

THE WILLETT COMPANY OF INDIANA, INC.

EXTENSION, FORT WAYNE-MACKINAW CITY, MICHIGAN

Chicago, Illinois.

*Order*

Upon consideration of the record in the above-entitled proceeding; and of petitions, dated November 11, 1943, filed jointly by Interstate Motor Freight System and Parker Motor Freight, protestants, for reopening, reconsideration, further hearing, and oral argument; and good cause appearing:

It is ordered, that said petition be, and it is hereby denied.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

1227 In the Supreme Court of the United States

October Term, 1944

No. 507

*Statement of points to be relied upon and designation of the record to be printed*

Filed October 14, 1944

Come now the appellants and say that they will rely upon the points made in their assignment of errors in brief and oral argument before this Court on their appeal in the above-entitled cause. Appellants further state that the entire record in this cause as filed in this Court is necessary and should be printed to enable the Court to consider the points set forth above, except the following items in the appellants' praecipe for transcript of record: Items 2 and 8; and except item 3 of appellees' praecipe for additional parts of record.

Dated October 13, 1944.

DANIEL W. KNOWLTON,
*Chief Counsel,*
DANIEL H. KUNKEL,
Daniel H. Kunkel,
*Attorney for Interstate Commerce Commission.*

1228

HARRY E. YOCKEY,
KIRKWOOD YOCKEY,
*For Willett Company of Indiana, Inc.*
A. M. DONNAN,
OSCAR LINDSTRAND,
H. Z. MAXWELL,
JOHN DICKINSON,
*For The Pennsylvania Railroad Company.*

1229 CERTIFICATE OF SERVICE

It is hereby certified that a copy of the above was served upon counsel for appellees by mailing the same to them addressed as follows: K. F. Clardy, 712 Olds Tower, Lansing, Mich.; Howell Ellis, 520 Illinois Building, Indianapolis, Ind.; Fred I. King, 1008 Odd Fellows Building, Indianapolis, Ind.; Robert E. Des Roches, 712 Olds Tower, Lansing, Mich.; John S. Powell, 520 Illinois Building, Indianapolis, Ind.

DANIEL H. KUNKEL.
Daniel H. Kunkel.

1233 In the Supreme Court of the United States

October Term, 1944

No. 508

*Statement of points to be relied upon and designation of parts of record to be printed*

Filed Oct. 21, 1944

Appellant United States of America, pursuant to Rule 13, paragraph 9, as its statement of the points on which it intends to rely, adopts those set forth in its assignment of errors heretofore filed, and designates for printing, as necessary to the consideration of the case, the entire record as certified and transmitted by the clerk of the district court.

CHARLES FAHY,
Charles Fahy,
*Solicitor General.*

1234 Supreme Court of the United States

Nos. 507 and 508—October Term, 1944

*Order noting probable jurisdiction*

November 6, 1944

The statement of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

[File endorsement on cover:] File No. 48960, 48961. D. C. U. S., S. INDIANA. Enter Daniel W. Knowlton. Term No. 507. Interstate Commerce Commission, The Willett Company of Indiana, Inc., and The Pennsylvania Railroad Company, Appellants vs. Harry A. Parker, doing business as Parker Motor Freight, Regular Common Carriers Conference of the American Trucking Associations, Inc., et al. Enter Solicitor General. Term No. 508. The United States of America, Appellant, vs. Harry A. Parker, doing business as Parker Motor Freight, Regular Common Carriers Conference of the American Trucking Associations, Inc., et al. Filed September 26, 1944 Term No. 507 O. T. 1944, 508 O. T. 1944.

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